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[redacted]

[redacted]

(28,640)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 685.

LEIGH ELLIS & COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES C. DAVIS, AS AGENT, &c.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 30, 1922.

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UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and proceedings had and done at a regulate term of the United States Circuit Court of Appeals for the Fifth Circuit begun on the first Monday in October, A. D. 1921, at Atlanta, Georgia, before the Honorable Richard W. Walker, the Honorable Nathan P. Bryn, and the Honorable Alex C. King, Circuit Judges.

LEIGH ELLIS COMPANY, Plaintiffs in Error,

versus

JAMES C. DAVIS, Agent, Defendant in Error.

Be it remembered, That heretofore, to-wit, on the 8th day of August, A. D. 1921, a transcript of the record in the above styled cause, pursuant to a writ of error to the District Court of the United States for the Northern District of Georgia, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3755, as follows, to-wit:

TRANSCRIPT OF THE RECORD.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, NORTHERN DIVISION, HOLDING SESSIONS AT ATLANTA.

LEIGH ELLIS, AND C. E. CLARKE, COMPOSING THE FIRM OF LEIGH ELLIS & CO.,

versus No. 480, At Law.

JOHN BARTON PAYNE, AGENT.

DECLARATION.

To the Honorable the United States District Court in and for the Northern District of Georgia, Holding Sessions at Atlanta, Georgia:

Come now Leigh Ellis and C. E. Clarke, heretofore and at this time, and at all times herein named, doing business under the firm name of Leigh Ellis & Company and complaining of John Barton Payne, agent, respectfully show:

1. Plaintiffs doing business under the firm name aforesaid are each and both citizens of the State of Texas, residing in the City of Austin, County of Travis, in said State, and have been such citizens and residents during all the times hereinafter named.

2. Atlanta, Birmingham & Atlantic Railway Company, is a corporation, duly and legally incorporated under the laws of the State of Georgia, with authority to maintain and operate an interstate railway, a citizen of the State of Georgia, resident in the County of Fulton in said State and in the Northern District of Georgia, Atlanta Division, and has been such citizen, corporation and resident during all the times hereinafter named.

2 3. The defendant, John Barton Payne, is sued herein as the agent designated by the President, under authority of Section 206 of Transportation Act 1920, said defendant having been appointed such agent and being now the duly appointed and acting agent authorized to be sued herein.

4. This is an action at law based on causes of action arising out of the possession, use, and operation by the President of said Atlanta Birmingham and Atlantic Railway Company under the provisions of the Federal Control Act; and this action could have been brought in this Court and Division against said Railway Company prior to Federal Control.

5. This is a civil suit at law, arising under the laws of the United States, in which the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars.

6. William G. McAdoo, Walker D. Hines, and John Barton Payne were at different times since March 1, 1918, Directors General of the Atlanta, Birmingham & Atlantic Railway Company with the powers, obligations and liabilities imposed by the Act of March 21, 1918, known as the Federal Control Act.

7. Plaintiffs, doing business as aforesaid under the firm name aforesaid, are engaged in buying and selling cotton and were so engaged on the 25th day of March, 1918, and at all times since.

8. That heretofore, to-wit, on or about the 25th day of March, 1918, Savage Cotton Company, Inc., delivered 200 bales of cotton to said Railway Company, then being operated by W. G. McAdoo, the then Director General of Railroads, and said Company and the Director General under Federal Control issued to said Savage Cotton Company, Inc., a negotiable order bill of lading, reciting that said cotton was marked Mars and the weigh of such cotton was 99,300 pounds, a copy of said original bill of lading is attached hereto, marked Exhibit A, and reference thereto prayed as fully as though copied herein.

3

9. That on or about the 26th day of March, 1918, Savage Cotton Company, Inc., delivered 100 bales of cotton to the said Railway Company and to said Director General William G. McAdoo, and there was issued to said Savage Cotton Company, Inc., a negotiable order bill of lading, reciting the receipt of said cotton and reciting that said cotton was marked Dtfs and that the weight of such cotton was 49,725 pounds, a copy of said original bill of lading is attached hereto,

marked Exhibit B, and reference thereto prayed, as fully as though copied herein.

10. Both said bills of lading were issued subject to the laws of the United States and the liability on such contracts is determined by such laws.

11. After the execution and delivery of the two bills of lading, as set out in paragraphs 8 and 9 above, and copied in Exhibits A and B, said Savage Cotton Company, Inc., negotiated said Bills of Lading and sold the cotton, therein referred to, to plaintiff at and for the price of 34-3/4c. per pound, and plaintiffs paid said Savage Cotton Company, Inc., on reliance of said bills of lading, for the number of pounds stated therein.

12. Thereafter, and in accordance with the terms of said Bills of Lading, said Railway and the Director General of Railroads transported said cotton as therein contracted to do to Greensboro, in the State of North Carolina, and notified Revolution Cotton Mills, as contracted in said bills of lading.

4 13. The purchase of said cotton from the Savage Cotton Company, Inc., was ordered by Beane Bros. from H. T. Lamkin and Company, who, in turn, gave the order for said cotton to said Savage Cotton Company, Inc. After the delivery of said cotton to the railway company and the Director General and the issuance of said bills of lading, in accordance with the selling contract, said Savage Cotton Company, Inc., drew its drafts on plaintiffs for the value of the number of pounds of cotton shown in said bills of lading, at the price aforesaid, the total amount of said drafts being for the 200 bales $34,506.75 and for the

100 bales, $17,279.44. Relying on the bills of lading, aforesaid, plaintiffs paid on or about March 26, 1918, the amount of said drafts and thereby acquired title to the number of bales of cotton therein referred to and to the number of pounds of cotton stated.

14. After defendant delivered said 300 bales of cotton to Revolution Cotton Mills, it was discovered that the shipment of 100 bales instead of weighing 49,725 pounds, in fact weighed 34,413 pounds, and the shipment of 200 bales instead of weighing 99,300 pounds, in fact weighed 87,773 pounds, and there was a shortage of weight of said cotton 26839 pounds.

15. That by receipting and issuing bills of lading for a total of 149025 pounds of cotton, when in truth and in fact the cotton weighed 122,186 pounds said Railway, the Director General and the United States became severally bound to the owner and holder of said bills of lading to deliver the amount of cotton receipted for and which amounts were stated in the two bills of lading hereinbefore referred to. That when said Railway and Director General in fact delivered only 122,186, said Company and the United States became liable to plaintiffs, the owners and holders of said bills of lading, for the value of 26,839 pounds. That the value of said cotton, at the time and place of delivery and the price paid by plaintiff therefor, was 33-3/4c. per pound and a total value of the cotton which the carrier failed to deliver of $9,326.54.

16. Plaintiffs, having purchased and paid for the cotton shown in the bills of lading hereinbefore referred to, and having relied on the statements in said

Bills of Lading became the owners of said cotton and of said bills of lading and entitled to have been delivered to them, or their order, the number of pounds of cotton shown therein and the issuing carrier, having failed to deliver such cotton, and having delivered 26,-839 pounds less than was contracted to be delivered. became liable and promised to pay plaintiffs the value of said cotton, to-wit, the sum of $9,326.54, with interest thereon at the rate of 7% per annum from the 26th day of March, 1918, until paid.

17. Under and by virtue of the laws of the United States, plaintiffs are entitled to receive from the defendant, John Barton Payne, as agent, the amount due, as aforesaid, to-wit, $9326.54, together with interest at 7% from March 26, 1918, until paid.

18. No part of the amount here sued for has been paid.

Wherefore, plaintiffs pray that process shall issue directed to John Barton Payne in terms of the law to be served on on any agent or officer of the Atlanta, Birmingham & Atlantic Railway Company, on whom service may be had on suits against said Company, and that plaintiffs have judgment for their debt, interest, and costs.

WATKINS, RUSSELL & ASBILL,
Attorneys for plaintiffs, Fourth National Bank Bldg., Atlanta, Ga.

6 EXHIBIT "A."

7-25-19 5—M sets New Form 31

Standard Form Order Bill of Lading.

Arrangement of colors and forms in manifolding shipments consigned "to Order: (1) Shipping Order": [Blue]; (2) Bill of Lading [Yellow]; (3) Memorandum [Blue].

United States Railroad Administration.
Director General of Railroads.

Atlanta, Birmingham & Atlantic Railroad.

Order Bill of Lading—Original.

Shipper's No. .....
Agent's No. .....

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading, at Talladega, Ala., March 25th, 1918, from Savage Cotton Company Inc., the property described below, in apparent good order except as noted (contents and condition of contents of packages unknown) marked, consigned and destined as indicated below which said carrier (which word is to be understood throughout this bill of lading as meaning any person or corporation in possession of the property under the bill of lading) agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and

as to each party at any time interested in all or any of said property that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns.

This Bill of Lading is assignable; it is negotiable only insofar as may be required to carry out the promise of the carrier made in the following surrender clause, and is enforceable as provided in Section 10 of the Bill of Lading, according to its original tenor and effect.

The surrender of the Original Order bill of Lading properly indorsed shall be required before the delivery of the property, inspection of property covered by the bill of lading will not be permitted unless provided by law or unless permission is indorsed on the original bill of lading or given in writing by the shipper.

The Rate of Freight from ..... to ..... is in Cents per 100 Lbs.

If times 1st Class—If 1st Class—If 2nd Class—If Rule 25 If 3d Class—If Rule 26—If Rule 28—If 4th Class—If 5th Class—If 6th Class—If Class A—If Class B—If Class C—If Class D—If Class E—If Class H—Per Barrel—If Class F—If Special Per .....
(Mail Address—Not for purposes of Delivery).

Consigned to Order of Savage Cotton Company, Inc.
Destination, Greensboro, State of N. C., County of .....
Notify Revolution Cotton Mills,
At Greensboro, State of N. C., County of .....
Route ..... Car Initial ..... Car No. .....

No packages—Description of Articles and Special Marks —Weight (subject to Correction)—Class or Rate—Check Column.

200 B/C (Two Hundred) Marked MARS 99,300#
Car Initials ACL# 40779 & Wabash #71014.

If charges are to be prepaid, write or stamp here "To be prepaid."—Prepaid.

Received $466.64 to apply in prepayment of the charges on the property described hereon.

War Tax, $14.30.

....., Agent or Cashier.

Per ....., (The signature here acknowledges only the amount prepaid).

Charges Advanced: $.....

Savage Cotton Company, Shipper.
H. H. SUTTON, Agent.
Per S. E. GRAHAM.

6½ Conditions.

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused

by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier, or party in possession the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes; or from country damage on cotton. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence.

In case of quarantine the goods may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations, or authorities, or for the carrier's dispatch, or at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when goods are so discharged, or goods may be returned by carriers at owner's expense and risk to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the owners of the goods or be a lien thereon. The carriers shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts re-

quired by quarantine regulations or authorities, even though same may have been done by carrier's officers, crews, agents or employes, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof.

Sec. 2. In issuing this bill of lading this carrier (Which word is to be understood throughout the Bill of Lading as meaning any person or corporation in possession of the property under the Bill of Lading) agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury, not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight

charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to the recovery, claims must be made in writing to the originating or delivering carrier, with six months after delivery of the property (or in case of export traffic, within nine months after delivery at the port of export), or in case of failure to make delivery, then within six months (or within nine months in case of export traffic), after reasonable time for delivery has elapsed; and suits for loss damage or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed.

Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for devi-

ation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded

from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains, or until loaded into and after unloaded from vessels.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight, and average, if any, and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion, from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be peformed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions

contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no such carrier or party in possession shall be liable for any loss or damage resulting from fire, or for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from vermin, leakage, chafing, breakage, heat, frost, wet, explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances, whether existing prior to, at the time of, or after sailing; or unseaworthiness; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at any port or ports, to tow and be towed, to transfer, to transship, to lighter, to load and discharge goods at any time and assist vessels in distress, and to deviate for the purpose of saving life or property. Such water carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry such property upon deck.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors when performed by the rail carrier, and the liability for such lighterage shall be governed by the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

7 EXHIBIT "B."

7-25-19 5—M sets New Form 31

Standard Form Order Bill of Lading.

Arrangement of colors and forms in manifolding shipments consigned "to Order: (1) Shipping Order": [Blue]; (2) Bill of Lading [Yellow]; (3) Memorandum [Blue].

United States Railroad Administration.
Director General of Railroads.

Atlanta, Birmingham & Atlantic Railroad.

Order Bill of Lading—Original.

Shipper's No. .....
Agent's No. .....

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading, at Talladega, Ala., March 26th, 1918, from Savage Cotton Company Inc., the property described below, in apparent good order except as noted (contents and condition of contents of packages unknown) marked, consigned and destined as indicated below which said carrier (which word is to be understood throughout this bill of lading as meaning any person or corporation in possession of the property under the bill of lading) agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and

as to each party at any time interested in all or any of said property that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns.

This Bill of Lading is assignable; it is negotiable only insofar as may be required to carry out the promise of the carrier made in the following surrender clause, and is enforceable as provided in Section 10 of the Bill of Lading, according to its original tenor and effect.

The surrender of the Original Order bill of Lading properly indorsed shall be required before the delivery of the property, inspection of property covered by the bill of lading will not be permitted unless provided by law or unless permission is indorsed on the original bill of lading or given in writing by the shipper.

The Rate of Freight from ..... to ..... is in Cents per 100 Lbs.

If times 1st Class—If 1st Class—If 2nd Class—If Rule 25 If 3d Class—If Rule 26—If Rule 28—If 4th Class—If 5th Class—If 6th Class—If Class A—If Class B—If Class C—If Class D—If Class E—If Class H—Per Barrel—If Class F—If Special Per .....
(Mail Address—Not for purposes of Delivery).

Consigned to Order of Savage Cotton Company, Inc.
Destination, Greensboro, State of N. C., County of .....
Notify Revolution Cotton Mills,
At Greensboro, State of N. C., County of .....
Route ..... Car Initial L. & N. Car No. 90907

No packages—Description of Articles and Special Marks —Weight (subject to Correction)—Class or Rate—Check Column.

100 B/C (One Hundred Marked DTFS 49,725#.

If charges are to be prepaid, write or stamp here "To be prepaid."—Prepaid.

Receiver $238.68 to apply in prepayment of the charges on the property described hereon.

War Tax $7.16.

....., Agent or Cashier.

Per ....., (The signature here acknowledges only the amount prepaid).

Charges Advanced: $.....

Savage Cotton Company, Shipper.

H. H. SUTTON, Agent.

Per .....

7½ "Conditions" on Reverse of Bill of Lading omitted from the Printed Record, being Identical with "Conditions" on Reverse of Exhibit "A", Copied at Page 9 hereof.

* * * * * * * * *

9 FIRST AMENDED PETITION.

Come now the plaintiffs in the above styled cause and by leave of the Court amend their petition heretofore filed herein and for cause therefor say:

Plaintiffs amend their petition by adding after paragraph 7 thereof new paragraphs numbered 7-A, 7-B and 7-C as follows:

7-A.

These plaintiffs filed suit on the cause of action herein stated against the Atlanta, Birmingham and Atlantic Railway Company and against the then agent and director general of the United States in this Court, as is fully shown by a copy, except the exhibits thereto which are the same as Exhibits A and B to the petition in this case, of the petition so filed attached hereto marked Exhibit C, and reference thereto prayed. Said suit was filed in this Court on Feb. 25, 1920, and was numbered 420 on the docket of this Court.

7-B.

Said original suit numbered At Law 420 continued pending in this Court up to the 21st day of January, 1921, at which time a demurrer to the jurisdiction was sustained and said cause dismissed; that the dismissal was not because this Court did not have jurisdiction of the subject matter but was based upon an order of the director general fixing the venue of suits.

7-C.

Within six months from the dismissal of said cause 420 and to-wit, on the 29th day of January, 1921, this

cause was filed, and all costs in the former suit were paid, and the cause of action originally pending re-commenced. Wherefore, plaintiffs pray as in their original petition.

WATKINS, RUSSELL & ASBILL,
Attorneys for Plaintiffs.

The foregoing amendment allowed subject to demurrer. This 25th day of June, 1921.

SAM'L H. SIBLEY,
U. S. Judge.

Filed in Clerk's Office 25th day of June, 1921.

EXHIBIT C.

To the Honorable the United States District Court in and for the Northern District of Georgia, Holding Sessions at Atlanta, Georgia.

Come now Leigh Ellis and C. E. Clarke, heretofore and at this time, and at all times herein named, doing business under the firm name of Leigh Ellis & Company and complaining of John Barton Payne, agent, respectfully show:

1. Plaintiffs doing business under the firm name aforesaid are each and both citizens of the State of Texas, residing in the City of Austin, County of Travis, in said State, and have been such citizens and residents during all the times hereinafter named.

2. Atlanta, Birmingham & Atlantic Railway Company is a corporation, duly and legally incorporated under the laws of the State of Georgia, with authority

to maintain and operate an interstate railway, a citizen of the State of Georgia, resident in the County of Fulton in said State and in the Northern District of Georgia, Atlanta Division, and has been such citizen, corporation and resident during all the times hereinafter named.

3. The defendant, John Barton Payne, is sued herein as the agent designated by the President, under authority of Section 206 of Transportation Act 1920, said defendant having been appointed such agent and being now the duly appointed and acting agent authorized to be sued herein.

4. This is an action at law based on causes of action arising out of the possession, use, and operation by the President of said Atlanta, Birmingham and Atlantic Railway Company under the provisions
12 of the Federal Control Act; and this action could have been brought in this Court and division against said Railway Company prior to Federal Control.

5. This is a civil suit at law, arising under the laws of the United States, in which the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars.

6. William G. McAddo, Walker D. Hines, and John Barton Payne were at different times since March 1, 1918, Directors Generals of the Atlanta, Birmingham & Atlantic Railway Company with the powers, obligations and liabilities imposed by the Act of March 21, 1918, known as the Federal Control Act.

7. Plaintiffs, doing business as aforesaid under the firm name aforesaid, are engaged in buying and selling cotton and were so engaged on the 25th day of March, 1918, and at all times since.

8. That heretofore, to-wit, on or about the 25th day of March, 1918, Savage Cotton Company, Inc., delivered 200 bales of cotton to said Railway Company, then being operated by W. G. McAdoo, the then Director General of Railroads, and said Company and the Director General under Federal Control issued to said Savage Cotton Company, Inc., a negotiable order bill of lading, reciting that said cotton was marked Mars and that the weight of such cotton was 99,300 pounds, a copy of said original bill of lading is attached, marked Exhibit A, and reference thereto prayed, as fully as though copied herein.

9. That on or about the 26th day of March, 1918, Savage Cotton Company, Inc., delivered 100 bales of cotton to the said Railway Company and to said Director General, William G. McAdoo, and there was issued to said Savage Cotton Company, Inc., a negotiable order bill of lading, reciting the receipt of said cotton and reciting that said cotton was marked Dtfe and that the weight of such cotton was 40,725 pounds, a copy of said original bill of lading is attached hereto, marked Exhibit B, and reference thereto prayed, as fully as though copied herein.

13

10. Both said bills of lading were issued subject to the laws of the United States and the liability on such contracts is determined by such laws.

11. After the execution and delivery of the two bills of lading, as set out in paragraphs 8 and 9, above, and

copied in Exhibits A and B, said Savage Cotton Company, Inc., negotiated said Bills of Lading and sold the cotton, therein referred to, to plaintiff at and for the price of 34-3/4c. per pound, and plaintiffs paid said Savage Cotton Company, Inc., on reliance of said bills of lading, for the number of pounds stated therein.

12. Thereafter, and in accordance with the terms of said Bills of Lading, said Railway and the Director General of Railroads transported said cotton as therein contracted to do to Greensboro, in the State of North Carolina, and notified Revolution Cotton Mills, as contracted in said bills of lading.

13. The purchase of said cotton from the Savage Cotton Company, Inc., was ordered by Beane Bros., from H. T. Lamkin and Company, who, in turn, gave the order for said cotton to said Savage Cotton Company, Inc. After the delivery of said cotton to the Railway Company and the Director General and the issuance of said bills of lading, and in accordance with the selling contract, said Savage Cotton Company, Inc., drew its drafts on plaintiffs for the value of the number of pounds of cotton shown in said bills of lading, at the price aforesaid, the total amount of said drafts being for the 200 bales $34,506.75 and for the 100 bales, $17,279.44. Relying on the bills of lading, aforesaid, plaintiffs paid on or about March 26, 1918, the amount of said drafts and thereby acquired title to the number of bales of cotton therein referred to and to the number of pounds of cotton stated.

14 14. After defendant delivered said 300 bales of cotton to Revolution Cotton Millls, it was discovered that the shipment of 100 bales instead of

weighing 49,725 pounds, in fact weighed 34,413 pounds, and the shipment of 200 bales instead of weighing 99,300 pounds, in fact weighed 87773 pounds, and there was a shortage in weight of said cotton 26,839 pounds.

15. That by receipting and issuing bills of lading for a total of 149,025 pounds of cotton, when in truth and in fact the cotton weighed 122,186 pounds said Railway, the Director General and the United States became severally bound to the owner and holder of said bills of lading to deliver the amount of cotton receipted for and which amounts were stated in the two bills of lading hereinbefore referred to. That when said Railway and Director General in fact delivered only 122,186 pounds, said Company and the United States became liable to plaintiffs, the owners and holders of said bills of lading, for the value of 26,839 pounds. That the value of said cotton, at the time and place of delivery and the price paid by plaintiff therefor, was 34-3/4c. per pound and a total value of the cotton which the carrier failed to deliver of $9,326.54.

16. Plaintiffs, having purchased and paid for the cotton show in the bills of lading hereinbefore referred to, and having relied on the statements in said Bills of Lading became the owners of said cotton and of said bills of lading and entitled to have delivered to them, or their order, the number of pounds of cotton shown therein and the issuing carrier, having failed to deliver such cotton, and having delivered 26,839 pounds less than was contracted to be delivered, became liable and promised to pay plaintiffs the value of said cotton, to-wit, the sum of $9,326.54, with interest thereon at the rate of 7% per annum from the 26th day of March, 1918, until paid.

15 17. Under and by virtue of the laws of the United States, plaintiffs are entitled to receive from the defendant, John Barton Payne, as agent, the amount due, as aforesaid, to-wit, $9326.54, together with interest at 7% from March 26, 1918, until paid.

18. No part of the amount here sued for has been paid.

Wherefore, plaintiffs pray that process shall issue directed to John Barton Payne in terms of the law to be served on any agent or officers of the Atlanta, Birmingham & Atlantic Railway Company, on whom service may be had on suits against said Company, and that plaintiffs have judgment for their debt, interest, and costs.

.....,
Attorneys for Plaintiffs. Fourth National Bank Bldg., Atlanta, Ga.

Filed in Clerk's Office 25th day of June, 1921.

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16 SECOND AMENDED PETITION.

Come now the plaintiffs in the above styled cause and by leave of the Court further amend their petition heretofore filed herein and for cause therefor say:

Plaintiffs amend their petition by adding after paragraph 17 in the original petition heretofore filed paragraphs as follows:

17-A.

Within six months after the delivery of said cotton to the said Atlanta, Birmingham & Atlantic Railway

Company, and to-wit, on or about the 25th day of April, 1918, a claim in writing for the loss hereinbefore stated was made to the said railway company, the originating carrier named in the bill of lading attached to the original petition as an exhibit, and said claim in writing was considered by said Atlanta, Birmingham & Atlantic Railroad and not finally acted on by said railroad until the 28th day of July, 1919, at which time the General Claim Agent of said railroad finally declined to pay plaintiffs the amount of this claim, and the claim was pending with the said railroad, which was then acting for and in behalf of the Director General and said Claim Agent was Agent of the Director General, up to and including the 28th day of July, 1919.

17-B.

A provision of the bill of lading attached to the original petition and marked exhibit "A", and a like provision in exhibit "B" wherein it is provided that suits for loss, damage or delay shall be instituted only within 2 years and 1 day after delivery of the property, or in case of failure to make delivery then within 2 years and 1 day after a reasonable time for delivery has elapsed, is null and void as being an un-
17 reasonable limitation in that it makes no provision for a reasonable period after the final denial of the carrier to pay a claim filed and is further unlawful in violation of section 3 of the Acts to Regulate Commerce in that the Agent of the United States, whom this defendant represents, and in that the railroads of the United States, including the Atlanta, Birmingham & Atlantic railroad have, from time to time, paid claims after the said period of 2 years and 1 day, and not to pay this petitioner its claim herein would

be an unjust discrimination against it in violation of said section 3 of said Act.

17-C.

That the Director General of Railroads, respresenting the Atlanta, Birmingham & Atlantic Railroad and the United States, in a case pending before the Interstate Commerce Commission and numbered 10696 and entitled Jacob E. Decker & Sons, v. Director General of Railroads, et al., agreed for the defendant in this case and the United States to pay claims that had run longer than 2 years and 1 day without suit being filed, and that each the U. S. Railroad Administration and the United States and the Atlanta, Birmingham & Atlantic Railroad has paid claims for which suit was not filed in 2 years and 1 day, and has made such payments on claims growing out of Federal control within the last year and within the last 2 years, and before and since the passage of Transportation Act 1920, for which reason the clause prescribing a limitation for suits is null and void in violation of section 1 and 3 of the Act to Regulate Commerce, and was so held to be void in said Decker case cited above by a decision of the Interstate Commerce Commission rendered on the 2nd day of December, 1919, and officially reported in Volume 55, p. 453, of the Reports of that Commission.

17-D.

That this cause of action is against the United States sued herein by suing its Agent, as authorized by the Transportation Act 1920, and this cause of action is based on that statute and no restrictions as to time of suit stated in said exhibits apply to this suit.

18

Wherefore, plaintiffs pray that this their amendment be allowed and that they have relief as prayed in their original and first amended petition.

WATKINS, RUSSELL & ASBILL,
Attorneys for Plaintiffs.

The foregoing amendment allowed subject to demurrer.

This 27th day of June, 1921.

SAM'L H. SIBLEY,
Judge.

Filed in Clerk's Office 27th day of June, 1921.

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19 PETITION AND ORDER SUBSTITUTING JAMES C. DAVIS, PARTY DEFT.

Come now plaintiffs in the above styled cause, and move to substitute for John Barton Payne, Agent, James C. Davis, Agent, and for cause show that as authorized by Section 206 A of the Transportation Act 1920, and since the filing of this case, the President has designated James C. Davis as Agent in the place of John Barton Payne, heretofore Agent and Agent when this suit was filed, and that therefore, James C. Davis is the proper defendant to be substituted for the original defendant.

Wherefore, plaintiffs pray an order making such substitution.

WATKINS, RUSSELL & ASBILL,
Attorneys for Plaintiffs.

The foregoing motion considered. It is ordered that John Barton Payne, Agent, and defendant in this case, be stricken as such defendant, and that James C. Davis, Agent, be substituted as such defendant, this order subject to the plea of jurisdiction and demurrer heretofore filed in this case.

SAM'L H. SIBLEY,
United States Judge.

Filed April 23d, 1921.

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20 JOHN BARTON PAYNE'S DEMURRER TO PLAINTIFF'S PETITION.

Now comes John Barton Payne, Director General of Railroads, defendant in the above stated case, and demurs to plaintiff's petition upon the following grounds:

1.

Because the allegations therein show no cause of action against this defendant and there is no cause of action set out in said petition.

2.

Because the facts stated in said petition show that this Court has no jurisdiction of the cause of action therein set out.

3.

Because under General Order No. 18-B, this suit should be brought against the Director General in the

district where the plaintiff resided at the time of the accrual of the cause of action, or in the district where the cause of action arose, or where the property was received for transportation, and the facts set out in the petition show that the plaintiffs did not reside in this district at the time of the accrual of the cause of action, and the cause of action did not originate in this district and that the property was not received for transportation in this district.

4.

Because there is no allegation in plaintiffs' petition that the defendant failed to deliver the exact number of packages set out in the Bills of lading, or failed to transport and deliver all the identical property, delivered to it for shipment.

5.

Because plaintiffs' petition shows upon its face that it is barred by the Statute of Limitations, having been brought more than two years and one day after the cause of action accrued and because copies of bills of lading attached as exhibits to their suit contain the following provision:

"Suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed,"

and it appears from said petition that this suit was instituted more than two years and one day after the delivery of the property or after a reasonable time for delivery had elapsed.

Wherefore, this defendant prays that the plaintiffs' petition may be dismissed.

COLQUITT & CONYERS,
BRANDON & HYNDS,
Attorneys for Defendant.

Filed in Clerk's Office Mar. 10, 1921.

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21 OPINION OF DEMURRER.

The amended petition filed January 28th, 1921, is admitted by the demurrer as true and makes this case: On March 25th, 1918, the Director General of Railroads issued a bill of lading for cotton moving in interstate commerce, "consigned to order of Savage Cotton Company, Incorporated, * * * No. of Packages 200; Description of Articles and Special Marks, B/C Two hundred marked M. A. R. S.; Car initials A. C. L. No. 40779 and Wabash No. 71014; Weight (Subject to correction) 99,300 lbs.," with freight prepaid in a stated amount. Among the conditions indorsed on the bill and referred to in its face was this: "Sec. 3. * * * and suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery then within two years and one day after a reasonable time for delivery has elapsed." A similar bill was issued for 100 other bales. Savage Cotton Company sold the cotton, indorsed the bills of lading and attached them to a draft on plaintiff, who paid the draft and took up the bills. The 300 bales of cotton were duly delivered but were found to weigh 26,839 pounds less than the weights stated in the bill. A claim was made for the shortage and a suit

filed within two years and one day from the delivery, which was dismissed because brought in the wrong venue. Within six months of the dimissal, but more than two years and one day after delivery, this suit was filed in renewal of that.

1. The suit is barred by the contract limitation. In dealing with a 90 day limitation in a bill of lading for live stock, the Supreme Court, in 1913, said:

22 "The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction or documents, or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. That is a question of law for the determination of the Court * * * The provision requiring suits to be brought within 90 days, is not unreasonable." M. K. & T. Railroad v. Harriman, 227 U. S.

The ruling was repeated in T. & P. Railroad Co. v. Leatherwood, 250 U. S. 479, as to a six months limitation in a bill of lading issued before the Act of March 4th, 1915. 38 Stat. 1196. That Act provided:

"It shall be unlawful for any common carrier to provide by rule, contract, regulation or otherwise a shorter period for giving notice of claims than 90 days and for the filing of claims a shorter period than 4 months and for the institution of suits than two years."

This Act plainly recognizes the propriety in bills of lading of contract limitations for the bringing of suits and names two years as a reasonable period to be stipulated. There is nothing in the Bills of Lading Act of August 26th, 1916, 39 Stat. 538, to the contrary. The ruling of the Interstate Commerce Commission, in 55 I. C. C. 453 is not controlling here. Its conclusion that the voluntary payment of meritorious claims duly presented and held up without action for more than two years, was not improper, did not necessarily require a consideration of the question whether a suit could be then maintained. So its conclusion that for the future bills of lading ought to date the limitation on suits from the rejection of the claim though evidently a finding that the dating of it from the time of delivery of the shipment was unreasonable in a sense, did not annul the rights of parties under contracts made in the past. Their rights are rather controlled by the decision and statutes referred to above.

2. The statutes of Georgia, Parks Code 4381, as of many other states, provide as an exception to the legal periods of limitation, that a suit in renewal of one dismissed but which has been brought in time, should stand on the same footing as to limitation as the original suit. But the plaintiff here is not met with any statute of limitations, State or Federal, but only with a contract limitation. The exception of the Georgia statute of limitations is not imported as an exception into the absolute stipulation of a contract. It has been so ruled repeatedly by the Supreme Court of Georgia; Melson v. Phoenix Insurance Co., 97 Ga. 722; Gross v. Globe Insurance Co., 140 Ga. 531. In Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386, 391, it is declared:

23

"The action mentioned in the condition which must be commenced in the twelve months is the one which is prosecuted to judgment. The failure of a previous action for any cause cannot alter the case although such previous action was commenced within the period prescribed."

The plaintiff, therefore, derives nothing from his previous ineffectual suit.

3. It is said that the contract limits only suits for the loss of or damage to goods shipped and does not cover the statutory liability here involved, and reference is made to the language of Sec. 1 of the conditions indorsed on the bill. Whatever may be the scope of Sec. 1, the language of Sec. 3: "Suits for loss, damage or delay" is broad enough to include all suits for damages arising out of the contract of shipment including the damage caused the bona fide holder of an order bill by its mis-recitals.

4. The case also fails on the merits. It is not claimed that the loss in weight was due to any injury to the cotton or to the destruction of any part of it, but the liability asserted is (Petition, Par. 15) "That by receiving and issuing bills of lading for a total of 149,025 pounds of cotton when in truth and in fact the cotton weighed 122,186 pounds, said Railroad and the Director General and the United States became bound to the owner and holder of said bills of lading to deliver the amounts of cotton receipted for, which amounts were stated in the two bills of lading hereinbefore referred to." The claim is based on that part of Section 22 of the Bills of Lading Act which relates to "Order Bills" such as these are; Section 22:

"That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading for transportation in commerce among the several states and with foreign nations, the carrier shall be liable to * * * (b) the holder of an order bill who has given value in good faith, relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier of all or a part of the goods, or their failure to correspond with the description thereof in the bill at the time of its issuance."

It is said the damage here was caused by (1) "the non-receipt by the carrier of part of the goods" in that 26,000 less pounds of cotton were received by it than were called for by the bill of lading and (2) by the failure of the bills to "correspond with the description thereof in the bill at the time of its issuance" in the matter of their aggregate weight. It will be noted that the statement of the bills here as to weight is not absolute or positive, but the weight is stated "'subject to correction", indicating that it may not be exact and is not represented to be. Now the liability declared in Section 22 must be considered in the light of Sections 20 and 21, which define the duties of the carrier in making the bill of lading and the things that must be ascertained by him and stated in the bill. These Sections divide goods delivered for shipment into, first, those loaded by the carrier, dealt with in Section 20, and, second, freight loaded by the shipper, dealt with in Section 21. Each of these classes is again divided into (a) package freight, and (b) bulk freight. As to goods loaded by the shipper, whether package freight or bulk freight, Section 22 permits the carrier

to describe the goods in the bill of lading merely by the marks on the packages, or to state that the contents and conditions of packages are unknown or are said to be of a stated kind or quality, or that they are "shipper's weight, load and count", and if the statements are true they impose no liability on the carrier for failure of the goods to correspond in kind or quality or condition to that indicated by the marks or statements of the consignor; but if the shipper of bulk freight has available weighing facilities, the carrier on written request and reasonable opportunity must ascertain the kind and quantity, and such words as "Shipper's Weight" inserted in the bill will be treated as void. In the case at bar there is nothing to indicate that the cotton was loaded by the shipper, so we turn to Section 20, dealing with shipments loaded by the carrier.

Sec. 20. "When goods are loaded by a carrier, such carrier shall count the packages of goods, if package freight and ascertain the kind and quantity if bulk freight, and such carrier shall not in such cases insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff "shipper's weight, load and count" or other words of like import indicating that the goods were loaded by the shipper and the description made by him, or in case of bulk freight and freight not concealed by packages, the description made by him. If so inserted contrary to the provisions of this Section said words shall be treated as null and void and as if not inserted therein."

This Section makes it the duty of the carrier in loading package freight to count the packages, but lays no duty on him to ascertain the kind, quantity or weight. In

loading bulk freight he must ascertain the kind and quantity. The fair implication is that he must state in the bill the number of packages so counted, and the kind and quality of bulk freight so ascertained. Section 22 imposes a liability for failure in accuracy of the statement so made in an order bill, making them in effect warrantees. Section 20 forbids any qualification of the statements as to these matters so required to be made, such qualifications being "as though not inserted therein."

Cotton in permanent bales in package freight. The bales are capable of marking and identification as are other packages. The sole duly laid on the carrier by Section 20, in loading the bales, is to count them, and he need state in the bill of lading only the number of packages and such marks or description as will serve to identify the packages meant. Not being bulk freight in the meaning of the Section, kind and quantity need not be ascertained and stated. If the description in the bill be enlarged by stating the nature of the contents of the packages, or the weight of them, it is voluntary and gratuitous, and the statement may be guarded and qualified as the carrier sees fit. Since freight is based on weight, the carrier will generally ascertain the weight also in the case of package freight and may conveniently state it in the bill as the basis for the freight charge. In doing so the statement may be made as "subject to correction)), as in the case at bar, for the prohibition of the statute against a qualification of the statement of the quantity applies only to bulk freight. If the carrier should, in an order bill, state more than the statute requires as to kind or description or quantity, it may be that the liability imposed by Section 22 to respond for damage caused would apply. In some state juris-

dictions such liability is recognized independently of statute. Thus where the packages were stated to be "cotton" there was a liability when they were only "motes"; C. R. I. & P. Railroad v. Cleveland (Okla.) 160 Pacific, 328. So where 100 bales were stated to have been shipped when in fact there were only 96; L. & N. Railroad v. Pferdermenger, 8 Ga. App. 81. But the ground of liability disappears when the statement is so qualified as to indicate that it is not made absolutely. N. C. & St. L. v. Flournoy, 139 Ga. 582. The statement here as to the weight of the bales, although it might have imposed liability if made absolutely, was so qualified as to indicate that it was to be corrected, and the qualification was not forbidden by law. It is appreciated that since cotton is not bought and sold by the package but by the pound, this conclusion militates greatly against the attainment of one of the aims of the Bills of Lading Act, but the liability cannot be extended beyond the plain words of the Act.

27 The demurrer will be sustained. This 5th day of July, 1921.

SAM'L H. SIBLEY,
U. S. Judge.

Filed in Clerk's Office, Jul. 6, 1921.

28 PETITION DISMISSED.

The demurrer to the petition as amended coming on for argument and counsel being fully heard, upon consideration, for the reasons stated in an opinion filed herewith, the demurrers are sustained and the petition dismissed. This 5th day of July, 1921.

SAM'L H. SIBLEY.
U. S. Judge.

Filed in Clerk's Office, Jul. 6, 1921.

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29 PETITION FOR WRIT OF ERROR.

To the Hon. Samuel H. Sibley, Judge of said Court:

And now comes Leigh Ellis and C. E. Clarke, composing the firm of Leigh Ellis & Company, plaintiff in the above stated case, by their attorneys, Edgar Watkins, and feeling themselves aggrieved by the final judgment of this Court entered against them, and in favor of James C. Davis, Agent, the defendant, on the 5th day of July, 1921, hereby pray that a writ of error may be allowed to them from the United States Circuit Court of Appeals for the Fifth Circuit to the District Court of the United States, Northern District of Georgia, Northern Division, and, in connection with this petition, petitioners herewith present their assignment of errors.

Petitioners further pray that the amount of security may be fixed by the order allowing the writ of error.

EDGAR WATKINS,
WATKINS, RUSSELL & ASBILL,
Attorneys for Plaintiff in Error,
Fourth Natl. Bank Bldg, Atlanta, Ga.

ORDER GRANTING WRIT OF ERROR.

Let the writ of error above prayed for issue upon the execution of the bond by Leigh Ellis and C. E. Clarke, composing the firm of Leigh Ellis & Company, payable to James C. Davis, Agent, in the sum of $500.00. This July 16, 1921.

SAM'L H. SIBLEY,
Judge U. S. District Court.
Northern District of Georgia.

Filed in Clerk's Office, Jul. 16, 1921.

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30 ASSIGNMENT OF ERRORS.

Now come Leigh Ellis and C. E. Clarke, composing the firm of Leigh Ellis & Company, plaintiffs below, plaintiffs in error here, and in connection with their petition for writ of error in this cause, assign the following errors which plaintiff in error avers occurred on the trial of the above styled cause and in the entry of the judgment sustaining the demurrer of the defendant and dismissing said cause, and upon which error

they rely to reverse the judgment entered herein as appears of record.

1. Because the Court erred in sustaining the defendant's demurrer, in dismissing the cause, and in holding and deciding that the cause of action sued on was barred.

2. Because the Court erred in sustaining the defendant's demurrer and dismissing the case of plaintiffs, and in holding and deciding that the terms of the bills of lading sued on providing that suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or after a reasonable time for delivery, apply to this action.

3. Because the Court erred in sustaining the defendant's demurrer, in dismissing plaintiffs' case and holding and deciding that plaintiffs did not have two years after their claim was denied in which to bring this suit.

4. Because the Court erred in sustaining defendant's demurrer, in dismissing plaintiff's case, and in holding and deciding that the provisions of the contract sued on were not, under the pleadings as amended, unreasonable and void.

31 5. Because the Court erred in sustaining the demurrer filed by defendant, in dismissing plaintiffs' case, and in holding and deciding that under the facts pleaded the defendant has not waived the limitation of the time to file suit by paying other like claims to other shippers after the expiration of two years and one day from the time of delivery and from

the expiration of a reasonable time in which to make delivery.

6. Because the Court erred in sustaining defendant's demurrer, in dismissing plaintiff's case, and in holding and deciding that this case was barred, the Congress of the United States having provided that the statutes of the United States or of Georgia, neither of which had run at the time suit was filed, should control.

7. Because the Court erred in sustaining defendant's demurrer and in dismissing this case and in not holding and deciding that the Statute of Limitations was tolled by the former suit pleaded by amendment.

8. Because the Court erred in sustaining defendant's demurrer, in dismissing plaintiff's cause of action, and in holding as a matter of law that this cause was barred, it being a question of fact under the pleadings as to whether or not the claimed contract limitation was or was not reasonable.

9. Because the Court erred in sustaining defendant's demurrer, and in dismissing this cause, it appearing from the pleadings that order bills of lading made negotiable by an Act of Congress issued by the carrier, for whose action the agent of the United States sued herein was responsible, and that plaintiffs were bona fide holders thereof and had lost the amount sued for because such bills of lading were false.

10. Because the Court erred in sustaining the defendant's demurrer, and in dismissing plaintiff's case, and in holding and deciding that the bills of lading sued on herein were non-negotiable.

32 11. Because the Court erred in sustaining the demurrer of the defendant, in dismissing plaintiff's suit on the holding and decision that the words "weight, subject to correct" had the force of destroying the negotiability of the bills of lading sued on.

12. Because the Court erred in sustaining the defendant's demurrer and in dismissing their suit, it being a question of fact for a jury whether there was such a shortage of weight in the cotton shipped as was reasonably within the meaning of "weight, subject to correction", or whether such phrase had reference only to slight variations in different weighing scales.

13. Because the Court erred in dismissing this cause and in sustaining defendant's demurrer, the pleadings both of the claim of limitation and of the effect of the bills of lading raising questions of fact for consideration by a jury.

Wherefore, plaintiffs in error pray that the judgment of such Court be reversed.

EDGAR WATKINS, and
WATKINS, RUSSELL & ASBILL,
Attorneys for Plaintiffs
in Error.

Filed in Clerk's Office July. 16, 1921.

33 BOND ON WRIT OF ERROR.

Know all men by these presents, that we, Leigh Ellis and C. E. Clarks, composing the firm of Leigh Ellis & Company, as principals, and American Surety Company, as surety, are held and firmly bound unto James C. Davis, Agent, in the full and just sum of Five Hundred ($500.00) Dollars, to be paid to the said James C. Davis, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 16 day of July. 1921.

Whereas, lately at a term of the District Court of the United States, for the Northern District of Georgia, in a suit jending in the said Court between Leigh Ellis and C. E. Clarke, composing the firm of Leigh Ellis & Company, and James C. Davis, Agent, a judgment was rendered against the said Leigh Ellis and C. E. Clarke, composing the firm of Leigh Ellis & Company, dismissing their said case, and the said Leigh Ellis and C. E. Clarke, composing the firm of Leigh Ellis & Company, having obtained a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit to reverse the judgment in the aforesaid suit,

Now, the condition of the above obligation is such, that if the said Leigh Ellis and C. E. Clarks, composing the firm of Leigh Ellis & Company, shall prosecute their writ of error to effect, and answer all damages
34 and costs if they fail to make their plea good,

then the above obligation to be void, else to remain in full force and virtue.

LEIGH ELLIS,
C. E. CLARKE, firm of
LEIGH ELLIS & CO.,
By EDGAR WATKINS, Attorney.
AMERICAN SURETY COMPANY
OF NEW YORK,
By W. G. LEAS,
Resident Vice-President.
(W. G. Leas.)

Attest:

A. O. DAVIS,
Resident Assistant Secretary.
(A. O. Davis)

Signed, sealed and delivered in the presence of
HORACE RUSSELL.

Approved by:

SAM'L H. SIBLEY, Judge.

Filed in Clerk's Office Jul. 16, 1921.

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35 Writ of Error and Citation omitted from the Printed Record,—the originals thereof being on file.

* * * * * * * * *

39 PRAECIPE.

To the Clerk of said Court:

Leigh Ellis and C. E. Clarke, comprising the firm of Leigh Ellis & Company, plaintiffs in error, direct you to forward to the United States Circuit Court of Appeals for the Fifth Circuit, with the writ of error, the parts of the record which they think necessary for the consideration of the errors assigned:

1. Petition herein.

2. First amendment thereto.

3. Second amendment thereto.

4. Motion to substitute and order substituting James C. Davis, Agent, as defendant.

5. Demurrer of defendant, John Barton Payne, Agent.

6. Opinion of Court on demurrer.

7. Order dismissing case.

8. Petition for writ of error.

9. Assignments of error.

10. Bond.

11. Order allowing writ of error.

12. Citation on error and acceptance of service thereof.

13. This designation of parts of the records with service thereof.

14. Clerk's certificate.

This 16th day of July, 1921.

EDGAR WATKINS,
WATKINS, RUSSELL & ASBILL,
Attorneys for Leigh Ellis & Company, Plaintiff in Error.
Fourth National Bank Building, Atlanta, Ga.

Filed in Clerk's Office, Jul. 16, 1921.

40 Service and copy of the foregoing designation of the record accepted and all other or further service and notice waived, and it is agreed that said designation states all of the record necessary to clear a understanding of the error complained of.

This July 16th, 1921.

COLQUITT & CONYERS,
BRANDON & HYNDS,
Attorneys for James C. Davis, Agent, Defendant in Error.

Filed in Clerk's Office Jul. 16, 1921.

CLERK'S CERTIFICATE.

United States of America,
Northern District of Georgia.

I, OLIN C. FULLER, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached forty (40) pages of printing and writing contains a true copy of the record, assignment of error, and all proceedings in the case of Leigh Ellis and C. E. Clarke, composing the firm of Leigh Ellis & Company, versus James C. Davis, Agent, et al., being No. 480 At Law and No. 84 Appeals, as specified in the Praecipe of counsel therein as fully as the same remains of record and on file in my office at Atlanta, Georgia, except that the original Writ of Error and the original Citation with acknowledgment of service thereon is included therein in the stead of a copy thereof.

In testimony whereof I hereunto set my hand and the seal of the said District Court, at Atlanta, Georgia, this the 26th day of July, A. D. 1921.

OLIN C. FULLER,
Clerk, United States District Court, Northern District of Georgia.

(Seal)

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of October 11th, 1921.

No. 3755.

LEIGH ELLIS & COMPANY

versus

JAMES C. DAVIS, Agent.

On this day this cause was called, and, after argument by Edgar Watkins, Esq., for plaintiff in error, and John A. Hynds, Esq., for defendant in error, was submitted to the Court.

Opinion of the Court.

Filed October 25th, 1921.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3755.

LEIGH ELLIS & COMPANY, Plaintiffs in Error,

versus

JAMES C. DAVIS, Agent, Defendant in Error.

Error to the District Court of the United States for the Northern District of Georgia.

Edgar Watkins for Plaintiffs in Error.
Watkins T. Colquitt, (Colquitt & Conyers, and Brandon & Hynds, on the brief), for Defendant in Error.

Before Walker, Bryan, and King, Circuit Judges.

By the COURT:

This was a suit, brought January 28, 1921, by the holder of two bills of lading issued by the Director General of Railroads on, respectively, March 25, 1918, and March 26, 1918, for cotton shipped, against the agent designated by the President under the provision of Section 206 of the Transportation Act of 1920. The claim asserted was based on the alleged fact that the cotton delivered weighed greatly less than the weights stated in the bills of lading. For reasons sufficiently stated in the opinion rendered by the District

Judge, (Leigh Ellis & Co., v. Payne, 274 Fed. 443), we are of opinion that the suit was barred by the provision in the bills of lading sued on that "suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery then within two years and one day after a reasonable time for delivery has elapsed." It follows that the judgment should be affirmed, and it is so ordered.

Affirmed.

Judgment.

Extract from the Minutes of October 25th, 1921.

No. 3755.

LEIGH ELLIS & COMPANY

versus

JAMES C. DAVIS, Agent.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiffs in error, Leigh Ellis and C. E. Clarke, composing the firm of Leigh Ellis & Company, and the surety on the writ of error bond herein, American Surety Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Petition for Writ of Error and Order Allowing Same.

Filed December 24th, 1921.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3755.

LEIGH ELLIS & COMPANY, Plaintiffs in Error,

v.

JAMES C. DAVIS, Agent, Defendant in Error.

Your petitioners, Leigh Ellis & Company, a firm composed of Leigh Eillis and C. E. Clarke, plaintiffs in error in the above entitled cause, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fifth Circuit, and that a judgment has therein been rendered on the 25th

day of October, 1921 affirming the judgment of the District Court of the United States for the Northern District of Georgia, Northern Division, and that the matter in controversy in said suit exceeds $1,000.00, besides costs, and is, to wit, the sum of $9,326.54, and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, nor the bankruptcy laws, and that it is not an admiralty case, that it is not a case arising under the Employes' Liability Act, nor is it a case arising under the Safety Appliance Acts, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioners would respectfully pray that a writ of error be allowed them in the above entitled cause directing the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiffs in error may be reviewed, and if error be found, corrected, according to the laws and customs of the United States.

LEIGH ELLIS & COMPANY,
LEIGH ELLIS,
C. E. CLARKE,
(Signed) By EDGAR WATKINS,
Their Attorney.

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiffs' giving bond according to law in the sum of $1,000.00.

(Signed) ALEX. C. KING,
United States Circuit Court.

Dec. 23, 1921.

Assignment of Errors.

Filed December 24th, 1921.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3755.

LEIGH ELLIS & COMPANY, Plaintiffs in Error,

v.

JAMES C. DAVIS, Agent, Defendant in Error.

And now come the plaintiffs in error, Leigh Ellis & Company, a firm composed of Leigh Ellis and C. E. Clarke, by Edgar Watkins, their attorney, and say that in the record and proceedings aforesaid

of said United States Circuit Court of Appeals for the Fifth Circ
in the above entitled cause, and in the rendition of the final judgm
therein, manifest error has intervened to the prejudice of said pla
tiffs in error, to wit:

1.

Said Circuit Court of Appeals erred in entering a judgment affir
ing the judgment of the District Court of the United States for t
Northern District of Georgia, and in holding that the declaration
this cause failed to state a cause of action, and in entering judgm
for costs in favor of said defendant in error and against said pla
tiffs in error.

2.

Said Circuit Court of Appeals erred in not reversing the judgm
of the United States District Court for the Northern District
Georgia, which judgment sustained a general demurrer to the dec
ration filed in said court by plaintiffs in error, and erred in not
versing the judgment of said United States District Court ente
therein on the 5th day of July, 1921, and in not remanding s
cause to said District Court for trial.

3.

Congress, by Section 206-A of Transportation Act 1920, havi
granted plaintiffs in error the right to sue, and having in said s
tion provided a statute of limitations which in no event would r
prior to February 28, 1922, and plaintiffs in error having filed th
original declaration in said United States District Court on Janua
28, 1921, said Circuit Court of Appeals erred in affirming the jud
ment of said District Court and in holding that the cause of acti
of plaintiffs in error was barred, and erred in not reversing and
manding said cause to the District Court for trial.

4.

Said Circuit Court of Appeals erred in holding that the contra
provision of the bills of lading attempting to limit the time in whi
suits are to be filed had any application, in view of the statute of t
Congress aforesaid, to the facts of this case, and erred in not reversi
the judgment of the said District Court and in not remanding th
cause to said court for trial.

5.

Said Circuit Court of Appeals erred in holding that the contra
limitation in the bills of lading sued on was a valid limitation, t
Interstate Commerce Commission having found in a proceeding
which the representatives *to* the United States were parties that sa
provision was unreasonable, unjustly discriminatory and undu

prejudicial, in violation of the Acts to Regulate Commerce; and said court erred in not reversing the judgment of the United States District Court and in not remanding said cause to said court for trial.

6.

Said Circuit Court of Appeals erred in not holding that the alleged contract limitation was waived by the United States, and erred in applying said limitation to the facts of this case and in not reversing the judgment of the District Court and in not remanding this cause to said court for trial.

7.

Said Circuit Court of Appeals erred in holding that should said contract limitation be valid that it had not been complied with, the declaration of plaintiffs in error showing that they had filed suit within the period prescribed by said contract limitation and that although said suit was subsequently dismissed the purpose of said contract limitation had been served by the filing of said suit, and said court erred for said reasons in not reversing the judgment of the United States District Court and in not remanding this cause to said court for trial.

8.

Said Circuit Court of Appeals erred in not reversing the judgment of the United States District Court and in not holding that plaintiffs in error had stated a good cause of action as the holders of order bills of lading made negotiable by Acts of Congress and sued on herein; and erred in not holding that plaintiffs in error were bona fide holders of said order bills of lading and entitled to recover the amount sued on herein, to wit, the sum of $9,326.54; and erred in not remanding this cause to the United States District Court for trial.

9.

Said Circuit Court of Appeals erred in affirming the judgment of the United States District Court wherein said District Court sustained the demurrer of defendant in error and dismissed the cause of plaintiffs in error, and wherein said United States District Court held and decided that the bills of lading sued on herein were not negotiable; and said Circuit Court of Appeals erred in not reversing said judgment and in not remanding this cause to the said court for trial.

10.

Said Circuit Court of Appeals erred in rendering a judgment against the plaintiffs in error and in favor of said defendant in error for costs of suit, and in sustaining the dismissal of the cause of plaintiffs in error.

Wherefore, the said Leigh Ellis & Company, a firm composed of Leigh Ellis & C. E. Clarke, plaintiffs in error, pray that for the errors aforesaid and further errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of plaintiffs in error, the said judgment of the United States Circuit Court of Appeals be reversed and annulled and for naught esteemed, and that said cause be remanded to the United States District Court for the Northern District of Georgia, Northern Division, with instructions to set aside the judgment of said court entered therein on the 5th day of July, 1921, and for such other proceedings in said cause as may be determined upon by this honorable court, to the end that justice may be done in the premises.

(Signed) EDGAR WATKINS,
Attorney for Plaintiffs in Error.

Bond on Writ of Error.

Filed December 24th, 1921.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3755.

LEIGH ELLIS & COMPANY, Plaintiffs in Error,

v.

JAMES C. DAVIS, Agent, Defendant in Error.

Know all men by these presents, That we, Leigh Ellis & Company, a firm composed of Leigh Ellis and C. E. Clarke, as principals, and American Surety Company of New York, as surety, are held and firmly bound unto James C. Davis, Agent of the United States, in the full and just sum of One Thousand ($1,000.00) Dollars to be paid to said James C. Davis, as Agent, his successors, attorneys or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 23 day of November, 1921.

Whereas, lately at the session of the Circuit Court of Appeals for the Fifth Circuit, in a suit pending in said court between Leigh Ellis & Company, plaintiffs in error, and James C. Davis, as Agent, a judgment was rendered against the said Leigh Ellis & Company, and the said Leigh Ellis & Company having obtained a writ of error and filed a copy thereof in the Clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James C. Davis, Agent, citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 23 day of Jan. next.

Now, the condition of the above obligation is such, that if the said Leigh Ellis & Company, a firm composed as aforesaid, shall prosecute

said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

LEIGH ELLIS & COMPANY,
LEIGH ELLIS,
C. E. CLARKE,
(Signed) By EDGAR WATKINS,
Attorney.
AMERICAN SURETY COMPANY OF NEW YORK,
Surety,
(Signed) By W. G. LEAS,
Resident Vice-President.
(W. G. LEAS.)

Attest:
[SEAL.] (Signed) M. W. COCHRAN,
Resident Assistant Secretary.
(M. W. COCHRAN.)

Sealed and delivered in the presence of
——— ———.
——— ———.

Dec. 23, 1921.
Approved by
(Signed) ALEX. C. KING,
United States Circuit Judge.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 49 to 58 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3755, wherein Leigh Ellis & Company are plaintiffs in error and James C. Davis, Agent, is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 48 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City

of New Orleans, Louisiana, in the Fifth Circuit, this 9th day of January, A. D. 1922.

[Seal of the United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3755.

LEIGH ELLIS & COMPANY, Plaintiffs in Error,

v.

JAMES C. DAVIS, Agent, Defendant in Error.

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to James C. Davis, as Agent of the United States, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the United States Circuit Court of Appeals for the Fifth Circuit, wherein Leigh Ellis & Company, a firm composed of Leigh Ellis and C. E. Clarke, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this 23 day of December, in the year of our Lord one thousand nine hundred and twenty-one.

ALEX. C. KING,
United States Circuit Judge.

Copy of writ served on us this 23rd day of December, 1921.

JAMES C. DAVIS,
By COLQUITT & CONYERS,
BRANDON & HYNDS,
Attorney-.

[Endorsed:] 3755. In the United States Circuit Court of Appeals, Fifth Circuit. Filed 27 day of December, 1921. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals before you, or some of you, between Leigh Ellis & Company, a firm composed of Leigh Ellis and C. E. Clarke, plaintiffs in error, and James C. Davis, Agent, defendant in error, No. 3755 on the docket of said Court, a manifest error hath happened, to the great damage of the said Leigh Ellis & Company, a firm composed of Leigh Ellis and C. E. Clarke, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the Twenty-seventh day of December, in the year of our Lord one thousand nine hundred and Twenty-one.

[Seal of United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

Allowed by

ALEX. C. KING,
United States Circuit Judge.

[Endorsed:] No. 3755. United States Circuit Court of Appeals, Fifth Circuit. Leigh Ellis & Company, Plaintiffs in Error, vs. James C. Davis, Agent, Defendant in Error. Writ of Error. Filed 9 day of January, 1922. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

Clerk's Office.

I hereby certify that a true copy of the within Writ has this day been lodged in the Clerk's Office for the use of the defendant in error.

New Orleans, La., January 9th, 1922.

[Seal of United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk.

Endorsed on cover: File No. 28,640. U. S. Circuit Court Appeals, 5th Circuit. Term No. 685. Leigh Ellis & Company, plaintiff in error, vs. James C. Davis, as Agent, &c. Filed January 12th, 1922. File No. 28,640.

(6104)

SEP 6 1922
WM. R. STANSB
CLE

No. 246

In the Supreme Court of the United States

October Term 1922

LEIGH ELLIS & COMPANY,
Plaintiff in Error

VERSUS

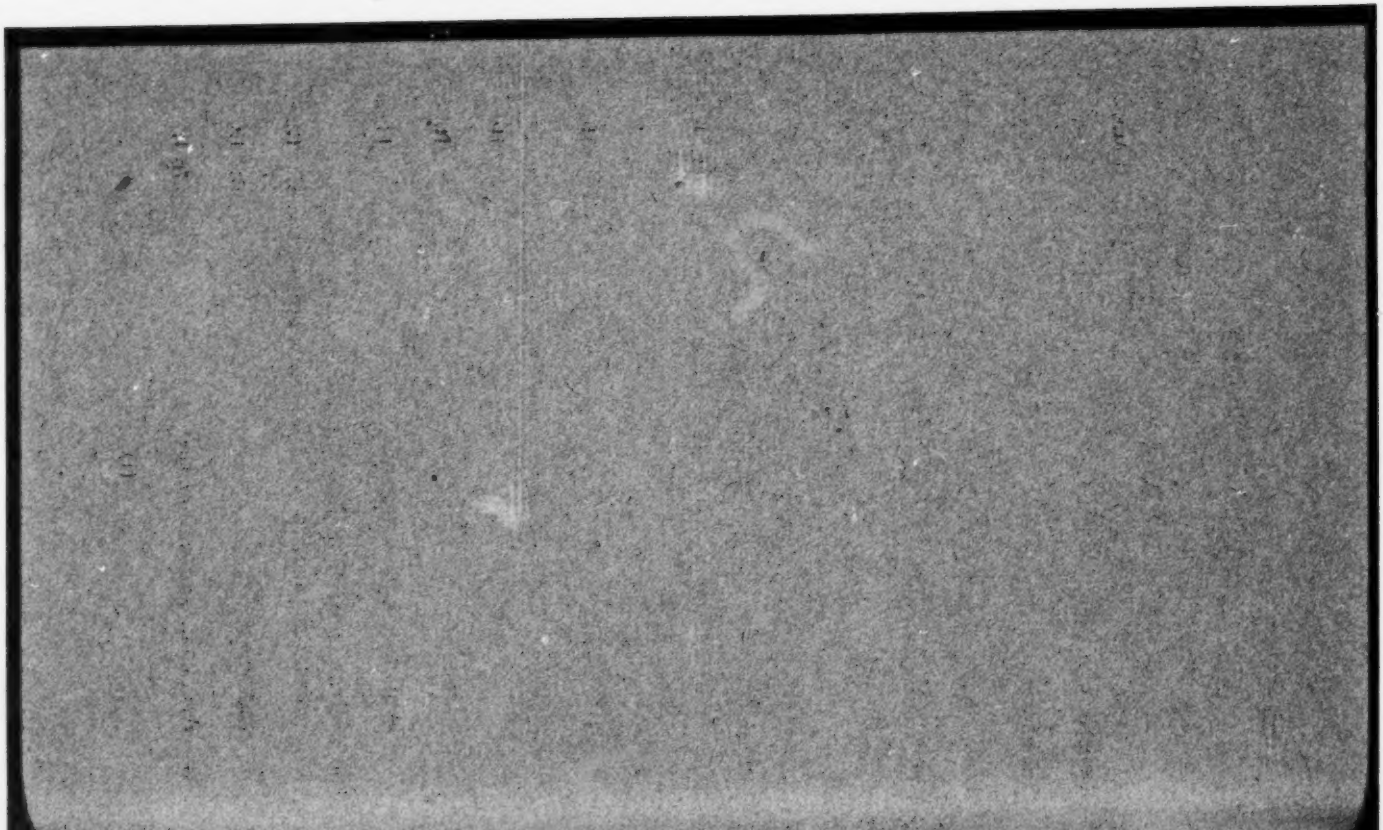
JAMES C. DAVIS, AGENT,
Defendant in Error

BRIEF FOR PLAINTIFF IN ERROR

By

EDGAR WATKINS,
(Watkins, Russell & Asbill)
Fourth National Bank Building,
Atlanta, Georgia.
Attorney for Plaintiff in Error.

Johnson-Dallis Co., Printers, Atlanta



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GENERAL STATEMENT OF THE CASE.

During the period of Federal Control of railroads and on March 25, 26, 1918, William G. McAdoo, Director General of Railroads, operating the Atlanta, Birmingham and Atlantic Railway Company, a corporation of the State of Georgia, issued, as required by section 20 of the Acts to Regulate Commerce, the two order bills of lading here involved.

The order bills of lading acknowledge the receipt for shipment in interstate commerce of 300 bales of cotton of the total recited weight of 149,025 pounds. Printed on the bills of lading, just above the weight stated, were these words: "Weight (subject to correction)." Only 122,186 pounds of cotton were received by the carrier or delivered by it to the consignee. Leigh Ellis & Company, treating the order bills of lading as negotiable, and acting in good faith in reliance thereon, paid the original consignor the current price for 149,025 pounds, but received at the termination of the shipping contract only 122,186 pounds of cotton, which, at the cost price for the difference between the amount of cotton paid for and the amount received, meant a loss of $9,326.54 for the recovery of which on January 29, 1921 (rec. 19) suit was filed in the United States District Court for the Northern District of Georgia, by Leigh Ellis & Company against John Barton Payne, then agent for the United States. Later the present agent, James C. Davis, was substituted for Agent Payne (rec. 28).

Two grounds of demurrer were presented and sustained by the trial judge. One ground is the claim that the two-year and one-day provision of the bills of lading relating to bringing suits bars the action, and the other ground is the claim that "weight (subject to correction)" in the bills of lading destroys their negotiability. (rec. 29 and opinion of court, rec. 31, and 274 Fed. 443.)

The Circuit Court of Appeals, by a per curiam opinion referring only to the claim that the action was barred, affirmed the lower court. (rec. 49-50, Leigh Ellis & Co. v. Davis, 276 Fed. 400). This writ of error was then sued out. Later a writ of certiorari was asked and denied.

JURISDICTION OF THIS COURT.

The original petition as amended shows jurisdictional allegations as follows:

(1) The Atlanta, Birmingham & Atlantic Railway Company is a corporation resident in the district where this suit was brought, and the members of the firm of Ellis & Company are residents of the State of Texas. (Paragraphs 1 and 2, rec. 2.)

(2) The action is brought against the agent "under authority of Section 206 Transportation Act 1920." (Par. 3, rec. 2.)

(3) The causes of action arose out of Federal Control and could have been brought prior to Federal Control in the Court wherein this suit was brought. (Par. 4, rec. 2.)

(4) The suit was one "arising under the laws of the United States" and the matter in controversy exceeds, exclusive of interest and cost, the sum of $3,000.00 and is $9,326.54. (Paragraphs 5 and 15, rec. 2, 5.)

(5) The "Act of March 21, 1918, known as the Federal Control Act" was relied on. (Par. 6, rec. 3.)

(6) The bills of lading sued on "were issued subject to the laws of the United States and the liability on such contracts is determined by such laws." (Par. 10. rec. 4.)

(7) Leigh Ellis & Co. was, to use the language of the law (Sec. 22 Bill of Lading Act),

> "The holder of an order bill who has given value in good faith (Petition paragraphs 13, 15) relying upon the description therein of the goods (Par. 16)."

And the firm is entitled, further to quote the statute, to "damages caused by the non-receipt by the carrier of * * part (149,025 less 122,186, or 26,839 pounds) of the goods."

(8) "Under and by virtue of the laws of the United States" plaintiff below claimed the right to recover (Par. 17, rec. 6).

(9) Specific federal statutes were pleaded and relied on: Transportation Act (rec. 2, 27), Federal Control Act (rec. 3), Acts to Regulate Commerce (rec. 26).

The jurisdiction of this court over this writ of error exists under Section 241 Judicial Code.

> Southern Pac. Co. v. Stewart, 245 U. S. 359, 362, 62 L. Ed. 345.
>
> Same case, 248 U. S. 446, 63 L. Ed. 350.

ISSUES FOR DETERMINATION.

The two questions here presented are:

(a) Does the statute, Transportation Act 1920, Section 206 (a), or the terms of the bill of lading determine the time in which suit must be brought? and

(b) Does the Bill of Lading Act of August 26, 1916 make negotiable the bills of lading here sued on?

These issues are distinct and will be separately presented.

PART I.

THIS SUIT SEASONABLY FILED.

CONGRESS GAVE THE RIGHT TO SUE AND UNDER THE STATUTE GRANTING THAT RIGHT, SUIT COULD BE BROUGHT ANY TIME PRIOR TO FEBRUARY 28, 1922.

Statement.

Assignments 3 and 4 raise this issue and are as follows:

Congress, by Section 206 (a) of Transportation Act 1920 having granted plaintiffs in error the right to sue, and having in said section provided a statute of limitations which in no event would run prior to February 28, 1922, and plaintiffs in error having filed their original declaration in said United States District Court on January 29, 1921, said Circuit Court of Appeals erred in affirming the judgment of said District Court and in holding that the cause of action of plaintiffs in error was barred, and erred in not reversing and remanding said cause to the District Court for trial.

Said Circuit Court of Appeals erred in holding that the contract provision of the bills of lading attempting to limit the time in which suits are to be filed had any application, in view of the statute of the Congress aforesaid, to the facts of this case, and erred in not reversing the judgment of the said District Court and in not remanding this cause to said court for trial. (Paragraphs 3, 4 of assignments of error, rec. 52.)

This suit was brought within the period of limitation prescribed by the statute.

Transportation Act 1920, 41 Stat. 456, C. 91, Sec. 206 (a) approved Feb. 28, 1920, makes the limitation in this case

"within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act."

ARGUMENT AND AUTHORITIES.

It was not contended below and probably will not be contended here that, if the statute be applied, suit was not brought in time. If such a contention should be made, it could not be sustained.

The only Federal statute that could apply is that contained in Judicial Code Sec. 24, Par. 20. If the Federal statute does not apply, that of the State of the forum must apply both by the terms of Sec. 206 (a) and under the decisions of this court.

> Chattanooga Foundry & Pipe Works vs. City of Atlanta, 203 U. S. 390, 51 L. Ed. 241, 3 Comp. Stat. Sec. 1538 R. S. U. S. 721) and pp. 3063, 3064, note 136 to 3 Comp. Stat.

Georgia Statute.

The shortest applicable Georgia statute is four years.

> Code Sec. 4368, Southern Exp. Co. vs. Sinclair, 135 Ga. 155, 156, and cases cited.

The Alabama Statute.

The applicable Alabama statute prescribes a limitation of six years.

> Alabama Code Secs. 2615, 4832, 4835 (4), Alabama G. S. R. Co. vs. Eichofer, 100 Ala. 224, 12 So. Rep. 56.

Apply the Federal statutes or the statute of the locus contractus, Alabama; or the statute of the forum, Georgia, and the case is not barred.

The contention of defendant below that will probably be made here is that the provisions of the bills of lading and not the statute fix the period in which suits must be brought.

SECTION 206 (a) OF THE TRANSPORTATION ACT SUPERSEDES ALL OTHER LIMITATIONS.

STATEMENT.

Assignments 3 and 4 (rec. 52) previously quoted on page 4 hereof raise this issue.

Since the bills of lading involved in this case were issued on March 25 and 26, 1918 and Transportation Act, 1920, was passed on February 28, 1920, it is clear that on the effective date of the act plaintiff in error had a cause of action, that arose during Federal control. The question here is what rights Section 206 (a) of the act confers upon plaintiff in error. The section reads:

> "Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control or of the Act of August 29, 1916) of such character as prior to Federal Control could have been brought against such carrier, may, after the termination of Federal Control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage

of this Act. Such actions, suits, or proceedings may, within the periods of limitations now prescribed by State or Federal statutes but not later than two years from the date of the passage of this act, be brought in any court which but for Federal Control would have had jurisdiction of the cause of action had it arisen against such carrier."

ARGUMENT.

Thus the section prescribes that suits may be brought on "causes of action" arising during Federal Control "against an agent designated by the President" "within the periods of limitations now prescribed by state or federal statutes," but not later than February 28, 1922. The only pre-requisites to the rights prescribed by the section is that plaintiff have a "cause of action" and that suit should be brought thereon "within the periods of limitation now prescribed by State or Federal statutes." Plaintiff in error had the cause of action and is therefore within the express words of the statute.

To deprive plaintiff in error of its rights under Section 206 (a) by holding that the time within which it had to bring suit was governed by a clause in the bills of lading and not by Section 206 (a) would require this court in effect to read into the Section after the words "cause of action" in the second line the words "not otherwise governed by bills of lading or contract provisions;" and after the clause "such action, suits or proceedings may within the periods of limitations now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act" the words "unless otherwise governed by bills of lading or contract provisions."

No convincing justification can be advanced for an interpretation of Section 206 (a) which ignores the express words therein used and deprives plaintiff in error of its rights thereunder. Bearing in mind that the purpose of

the Section was to afford relief to citizens for damages done them by their government, it is clear that a liberal construction of the section is more consonant with justice and more in keeping with the purpose of Congress in passing this statute than an interpretation which deprives citizens of their just rights under a plain statute and defeats the expressed object of Congress. Stewart vs. Kahn, 78 U. S. 493, 504, 20 L. Ed. 176; McClure vs. U. S., 115 U. S. 145, 150, 29 L. Ed. 572; Monongahela Navigation Co. vs. U. S., 148 U. S. 312, 326, 37 L. Ed. 463.

The carriers have filed their tariffs including bills of lading with the Interstate Commerce Commission and the provisions thereof are binding on all contracts of shipments of property, whether or not a bill of lading is actually issued, (Lazarus vs. New York C. R. R., 271 Fed. 93, New York Cent. R. R. vs. Lazarus, 278 Fed. 900) therefore, if the narrow interpretation of the lower courts is affirmed, Section 206 (a) can apply only to "causes of action" for personal injuries and for damages to property arising other than in transportation. Such an interpretation results in causes of action being excluded from the section although such causes are included in the express words of a statute passed as a relief measure.

Contracts made by the Director-General of railroads and shippers were between the government and the shippers (Mo. P. R. Co. vs. Ault, 256 U. S. 554, 65 L. Ed. 1087). The lower courts in this case have not taken this fact into consideration. The District Court disposed of the issue by saying:

"The suit is barred by the contract limitation" (274 Fed. 443), which opinion was concurred in by the Circuit Court of Appeals (276 Fed. 400). Apparently neither court considered the fact that the contract was the contract of the government.

In Lazarus vs. New York Central R. Co., 271 Fed. 93, reversed in 278 Fed. 900, the Circuit Court of Appeals refers arguendo to Section 206 (a). Section 206 (a) creates a cause of action against the United States while Section 206 (f) relates to a cause of action theretofore existing against a private corporation. The Lazarus case therefore on the question of limitation has no application here. In the Lazarus case the shipment moved before Federal Control, the contract of shipment was between the shipper and a private carrier, whereas in the present case the shipment was during Federal Control and the contract of shipment was between the government and a shipper.

This court judicially knows that prior to the Transportation Act, 1920, shippers with claims against the government arising out of Federal Control of the railroads were uncertain how and where to bring suit against the government, as is reflected by the conflicting decisions of the lower Federal Courts. At the time the original suit in this case was filed many courts had held that the statutory venue fixed by Section 10 of the Federal Control Act controlled, while other courts had held that general order number 18 of the Director-General controlled. This conflict was not finally settled by this court until its decision in the case of Ala. & Vicksburg Ry. Co. vs. Smith Journey, ____ U. S. ___, 66 L. Ed. advance pamphlet 15. These facts were before Congress when it passed Section 206 (a) and since Congress granted the right to sue and in the same statute prescribed a limitation period it is a proper assumption that Congress thought a longer period of limitations on claims arising during Federal Control was desirable to afford all claimants an adequate opportunity to enforce their rights. The intention of Congress was to fix a general statute of limitations applicable to all claims against the government arising out of Federal Control so that equal justice might be meted out to all.

Having a cause of action on February 28, 1920, and having filed suit on January 29, 1921, or less than two years from February 28, 1920, plaintiff in error is entitled to every right and benefit provided by Section 206 (a) to claimants, and one of these rights is the right to sue at any time within two years from February 28, 1922.

THE CLAIMED CONTRACT LIMITATION DOES NOT APPLY TO THIS KIND OF SUIT.

Statement.

The cause of action arose when the false bills of lading were issued. The bills of lading are dated March 25 and 26, 1918 (rec. 3). This suit was filed January 29, 1921 (rec. 19).

The bills of lading provide (sec. 1, rec. 9) that the carrier "shall be liable (1) for any loss thereof (of the property), (2) or damage thereto * * * (briefly stated negatively) * * or (3) for the differences in the weights when not 'caused (rec. 10) by natural shrinkage or discrepancies in elevator weights'; or (4) delay." "Loss, damage or delay" being also coupled (rec. 10) as things for which the carrier under the circumstances named is liable. The so-called limitation clause (bill of lading sec. 3, rec. 10) reads:

> "Suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed."

The suit here is not for a failure to deliver property received by a carrier, but for the wrong of the carrier in issuing a false bill of lading.

Argument and Authorities.

"Failure to deliver" in the quotation from the bill of lading connotes a receipt of goods by a carrier and can have no application to a case where the carrier never received the goods for which suit is brought.

The words "loss" and "damage" are broad in their signification, and "damage" might itself be broad enough to include the right to recover for any breach of a legal duty. These words, however, in transportation, have a conventional meaning clearly apparent from the context, and the particular contract sued on here shows definitely such a meaning and a definite limitation.

If there be any doubt as to the construction of the limitation clause, the doubt should be resolved against the limitation. This principle is well discussed in the case of Lynchburg Cotton Mill Co. vs. Travelers Insurance Co., 140 Fed. 718, at bottom of page 724. It is not contended that the period of limitation prescribed in the bills of lading would not be valid, except on the ground that it was preferentially applied. It might have been valid if it had not been waived by the payment after two years of some claims. The contract does not apply. In discussing a similar limitation this court said:

> "Certainly it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation, without a **clear and express stipulation to that effect** obtained by him from his employer."
>
> Southern Exp. Co. vs. Caldwell, 88 U. S. 65, 21 Wall. 164, 266, 22 L. Ed. 556.

THE CONTRACT PROVISION LIMITING THE TIME FOR SUIT IS UNDER THE FACTS PLEADED UNREASONABLE AND VOID.

Statement.

This specification of error is based upon paragraph 5 of the assignment, which reads as follows:

> Said Circuit Court of Appeals erred in holding that the contract limitation in the bills of lading sued on was a valid limitation, the Interstate Commerce Commission having found in a proceeding to which the representatives to the United States were parties, that said provision was unreasonable, unjustly discriminatory and unduly prejudicial, in violation of the Acts to Regulate Commerce; and said court erred in not reversing the judgment of the United States District Court and in not remanding said cause to said court for trial. (Rec. 52-3.)

Plaintiff below (rec. 27) pleaded:

> "That the Director General of Railroads, representing the Atlanta, Birmingham & Atlantic Railroad and the United States, in a case pending before the Interstate Commerce Commission and numbered 10696 and entitled Jacob E. Decker & Sons vs. Director General of Railroads, et al., agreed for the defendant in this case and the United States to pay claims that had run longer than 2 years and 1 day without suit being filed, and that each the U. S. Railroad Administration and the United States and the Atlanta, Birmingham & Atlantic Railroad has paid claims for which suit was not filed in 2 years and 1 day, and has made such payments on claims growing out of Federal control within

the last year and within the last 2 years, and before and since the passage of Transportation Act 1920, for which reason the clause prescribing a limitation for suits is null and void in violation of section 1 and 3 of the Act to Regulate Commerce, and was so held to be void in said Decker case cited above by a decision of the Interstate Commerce Commission rendered on the 2nd day of December, 1919, and officially reported in Volume 55, p. 453, of the Reports of that Commission."

Argument and Authorities.

The validity of the contract limitation in the standard bill of lading was looked upon differently by different carriers, and a complaint was filed before the Interstate Commerce Commission against the Director General of Railroads and the railroads of the United States. In that complaint it was shown that some roads were paying loss and damage claims after two years; others were not. In the proceeding the General Solicitor of the Director General stated:

"It appears that on some railroads claims for loss and damage, upon which suits have not been brought before the expiration of the two years and one day limitation in the bill of lading, are being paid by Freight Claim Agents, while on other railroads the payment of such claims is being declined on the ground that same cannot legally be paid.

"The question as to whether or not such claims may lawfully be paid is now pending before the Interstate Commerce Commission. In order to secure uniformity of practice over all Federal controlled lines, and to maintain the status quo pending the decision of the Interstate Commerce Commission, please instruct all General Solicitors and Freight Claim Agents to withhold payment pending such decision.

> "Should the decision of the Commission be favorable to the payment of such claims, it will be the policy of the Administration, during a limited period thereafter, to pay all meritorious claims of this kind, provided the consent of the Railroad corporation may be secured."

Upon final conclusion of the case, and on December 2, 1919, the Commission said:

> "We find that the bill of lading provisions in question were and are unreasonable, unjustly discriminatory, and unduly prejudicial."

Following this finding the Commission prescribed a rule for future application. Decker & Sons v. Director General, 55 I. C. C. 453.

The result of that opinion is that all contract limitations theretofore in existence are found to be unreasonable and unlawful. A new provision is suggested but that new provision does not become a rule of conduct until it is inserted in the bills of lading, and it was not inserted in the contract on which this suit was brought. The effect of the decision of the Interstate Commerce Commission is to nullify all contract limitations then and theretofore contained in the bills of lading.

It is not doubted and has frequently been held that the period of two years in which suits may be filed is ordinarily a reasonable provision, but the peculiar circumstances in this case which are similar to the facts considered by the Interstate Commerce Commission, show that even if the contract limitation is applied, it is unreasonable.

The Director General of Railroads, whom the present agent of the United States succeeds, and all the railroads of the country were parties to the judgment of the Interstate Commerce Commission in the Decker case, supra.

The decision of the Interstate Commerce Commission holding the particular contract limitation here relied upon to be unreasonable, void and in violation of the Act to Regulate Commerce, becomes the law unless set aside in a direct proceeding. No such proceeding has been brought and that decision is now the law binding on all courts.

In Interstate Commerce Commission v. Union Pacific Railroad Co., 222 U. S. 541, 56 L. Ed. 308, 32 Sup. Ct. 108, Mr. Justice Lamar said:

> "The law makes the Commission's findings on such facts conclusive."

In A. T. & S. F. Ry. Co. v. United States, 232 U. S. 199, 58 L. Ed. 568, 38 Sup. Ct. 291, Mr. Justice Lamar, delivering the opinion of the Supreme Court, said:

> "All these matters are committed to the decision of the administrative body, which in each instance is required to fix reasonable rates, and establish reasonable practices. The courts have not been vested with any such power. They cannot make rates. They cannot interfere with rates fixed or practices established by the Commission unless it is made plainly to appear that those ordered are void."

There are many cases holding that the orders of the Commisison, unless set aside in a direct proceeding, are binding on the courts, and even in suits to set them aside they are binding if the Commission has observed the law.

These cases are cited in Sections 309-316 inclusive of the Third Edition of Watkins' Shippers & Carriers.

THE UNITED STATES, THE REAL PARTY DEFENDANT HERE, HAS WAIVED THE CONTRACT LIMITATION, IF THAT LIMITATION IS APPLICABLE AND VALID.

Statement.

Paragraph 6 of the assignment of error, from which this specification of error is taken, reads:

> Said Circuit Court of Appeals erred in not holding that the alleged contract limitation was waived by the United States, and erred in applying said limitation to the facts of this case and in not reversing the judgment of the District Court and in not remanding this cause to said court for trial. (Rec. 53.)

Plaintiff (rec. 26, 27) pleaded:

> "A provision of the bill of lading attached to the original petition and marked exhibit 'A', and a like provision in exhibit 'B', wherein it is provided that suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery then within two years and one day after a reasonable time for delivery has elapsed, is null and void as being an unreasonable limitation in that it makes no provision for a reasonable period after the final denial of the carrier to pay a claim filed and is further unlawful in violation of section 3 of the Acts to Regulate Commerce in that the Agent of the United States, whom this defendant represents, and in that the railroads of the United States, including the Atlanta, Birmingham & Atlantic railroad have, from time to time, paid claims after the said period of two years and one day, and not

to pay this petitioner its claim herein would be an unjust discrimination against it in violation of said section 3 of said Act."

Argument and Authorities.

The facts pleaded, and admitted to be true by the demurrer, show that the provision relied on by defendant to bar this action is violative of the Acts to Regulate Commerce and void and bring this case within the findings of the Interstate Commerce Commission, which, in the Decker case, supra, said:

> "We find that the bill of lading provisions in question were and are unreasonable, unjustly discriminatory, and unduly prejudicial."

The United States, by Act of Congress, in Transportation Act. Sec. 206(a), fixed the statute of limitation and granted the right to file this suit. By that statute the United States disregarded, repealed and set aside any contract limitation. Further, the United States waived the limitation by the representations made by the Director General and quoted above in the case of Decker v. Director General, 55 I. C. C. 455, 456.

THE FILING OF A FORMER SUIT CONTAINING ESSENTIALLY THE SAME ALLEGATIONS AS THIS SUIT TOLLED THE STATUTE OF LIMITATIONS.

Statement.

Paragraph 8 of the assignment of errors, from which this specification is taken, reads:

> Said Circuit Court of Appeals erred in holding that should said contract limitation be valid that it had not

been complied with, the declaration of plaintiffs in error showing that they had filed suit within the period prescribed by said contract limitation and that although said suit was subsequently dismissed the purpose of said contract limitation had been served by the filing of said suit, and said court erred for said reasons in not reversing the judgment of the United States District Court and in not remanding this cause to said court for trial. (Rec. 53.)

Plaintiff filed its first suit within two years from the dates of the bills of lading. The first suit was dismissed because in fixing the venue, Section 10 of the Federal Control Act was literally followed and the orders of the Director General were not followed. Ellis v. Atlanta, B. & A. Ry. Co., 270 Fed. 279. For facts pleaded see record 19-25.

The false bills of lading were issued March 25, 26, 1918. (Rec. 3.) A claim for the amount sued on was filed April 23, 1918. That claim was finally denied July 28, 1919. The suit now before the court was filed January 29, 1921.

Argument and Authorities.

The learned trial judge, in his opinion in this cause, bottom of page 33, cites Georgia cases and the case of Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386, in support of his position that the filing of a suit does not, when that suit is not prosecuted to judgment, suspend the statute of limitations. The cases cited, it is submitted, are not in point. In Riddlesbarger v. Hartford Ins. Co., cited by the court, the facts show:

"The policy contains the condition that no action against the Company for the recovery of any claim upon the policy shall be sustained, unless commenced within twelve months after the loss shall have occurred; and, that the lapse of this period shall be con-

clusive evidence against the validity for any claim asserted, if an action for its enforcement be subsequently commenced."

The Georgia statute does not control and the contract in the Riddlesbarger case differs from the contracts here. Here there is no provision in the contracts similar to the one quoted. The provisions here are that "suits for loss, damage or delay shall be instituted only within two years and one day". There is no provision that the failure to bring suit shall be conclusive evidence against the validity of the claim as there was in the Riddlesbarger case.

The rule announced by this court in Semmes v. Insurance Co., 13 Wall. 158, 20 L. Ed. 490, is the rule applicable here. In the Semmes case the court said:

> "So, also, if the plaintiff shows any reason which in law rebuts the presumption, which, on the failure to sue within twelve months, is, by the contract, made conclusive against the validity of the claim, that presumption is not revived again by the contract."

The distinction between the facts of this case and the facts in the Riddlesbarger case are discussed by the Circuit Court of Appeals for the Second Circuit in Rogers v. Home Insurance Co., 35 C. C. A. 102, 95 Fed. 109, where the court said:

> "There is a material difference between a condition providing that no suit or action against the company for the recovery of any claim under the policy shall be sustainable, unless commenced within twelve months, and one providing that 'all claims under this policy shall be void, unless prosecuted by suit at law within a year.' The former reaches the particular action brought upon the claim. Wilson v. Insurance Co., 27 Vt. 99. Unless it is commenced within the year, the imperative terms

of the contract prevent a recovery, and it is wholly immaterial that the claim may have been sued upon previously. The latter reaches the claim, but not necessarily the action which has not been prosecuted within the year. It declares the claims void that have not been prosecuted within the year, but touches no other claims. As it does not refer to the time within which the action must be brought, if the claim is not void, the time would seem to be immaterial. If the claim upon which it is brought has been prosecuted within the year, its terms are literally satisfied. Any ambiguity in the condition is to be resolved against the company, and it should receive the interpretation most favorable to the assured. First Nat. Bank of Kansas City v. Hartford Fire Ins. Co., 95 U. S. 673."

The rule contended for is especially equitable and applicable here. Under Federal Control Act, the Congress (Sec. 10) said that suits should be filed as theretofore; the Director General prescribed a different venue; some courts said one one thing and some another; in one jurisdiction the statute was enforced; in another the proclamation of the Director General was followed and the claimants did not know where to sue, and this court had not decided which venue was proper prior to the filing or dismissal of the original suit. It is not conceivable that any government will take advantage of confusion and uncertainty produced by itself to defeat just claims.

THE FINDING OF THE INTERSTATE COMMERCE COMMISSION, IT IS BELIEVED, MAKE VOID THE CLAIMED CONTRACT OF LIMITATION, BUT IF NOT, THE FACTS PLEADED PRESENT AN ISSUE FOR A JURY.

Statement.

Sections 2 and 3 of the Acts to Regulate Commerce prohibit undue preferences and unjust discrimination. The

Director General of Railroads and the Atlanta, Birmingham & Atlantic Railroad have paid claims after the period of two years and one day from the time the claim arose. Such a waiver of the contract for some shippers results in a similar waiver for all shippers. Such payment has been made under circumstances similar to those involved here and to pay part of such claims and not to pay all of such claims is an unjust discrimination and an undue preference. (See pleadings, record 26 and 27.)

It is believed that the decision of the Interstate Commerce Commission determines this question as a matter of law in favor of the plaintiff, but if we are wrong in that belief, the question is one that should be submitted to the jury after the introduction of testimony. If the facts found by the Commission are true, and we think the law conclusively presumes they are, the claimed limitation provisions are void; if the findings of the Commission are not conclusive, the issue is one for a jury.

PART II.

ORDER BILLS OF LADING

ORDER BILLS OF LADING ARE MADE NEGOTIABLE BY ACT OF CONGRESS.

Statement.

The trial judge held that the printed words "weight (subject to correction)" which appear on the order bills of lading sued on, just above the written statement of the weight of the cotton acknowledged to have been delivered, destroy the negotiability of such contracts. (Rec. 34-38, 274 Fed. 443.) The Circuit Court of Appeals affirmed the trial court, basing the opinion on the limitation clause and not discussing this question. (Rec. 49-50, 276 Fed. 400.)

The foregoing general specification of error arises on sub-divisions 8 and 9 of the assignment of errors (rec. 53), which sub-divisions are as follows:

> Said Circuit Court of Appeals erred in not reversing the judgment of the United States District Court and in not holding that plaintiffs in error had stated a good cause of action as the holders of order bills of lading made negotiable by Acts of Congress and sued on herein; and erred in not holding that plaintiffs in error were bona fide holders of said order bills of lading and entitled to recover the amount sued on herein, to-wit, the sum of $9326.54; and erred in not remanding this cause to the United States District Court for trial.
>
> Said Circuit Court of Appeals erred in affirming the judgment of the United States District Court wherein said District Court sustained the demurrer of defend-

ant in error and dismissed the cause of plaintiffs in error, and wherein said United States District Court held and decided that the bills of lading sued on herein were not negotiable; and said Circuit Court of Appeals erred in not reversing said judgment and in not remanding this cause to the said court for trial.

Authorities and Argument.

The facts upon which these assignments arise sufficiently appear from the opinion of the learned trial judge (rec. 34 and 35). This part of the opinion is, for convenience of reference, reproduced and is as follows:

"The liability asserted is (Petition, Par. 15) 'That by receiving and issuing bills of lading for a total of 149,025 pounds of cotton when in truth and in fact the cotton weighed 122,186 pounds, said railroad and the Director General and the United States became bound to the owner of said bills of lading to deliver the amounts of cotton receipted for, which amounts were stated in the two bills of lading hereinbefore referred to.' The claim is based on that part of Section 22 of the Bills of Lading Act which relates to 'Order Bills' such as these are; Section 22:

" 'That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading for transportation in commerce among the several states and with foreign nations, the carrier shall be liable to * * * (b) the holder of an order bill who has given value in good faith, relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier of all or a part of the goods, or their failure to correspond with the description thereof in the bill at the time of its issuance.'

"It is said that the damage here was caused by (1) 'the non-receipt by the carrier of part of the goods' in that 26,000 less pounds of cotton were received by it than were called for by the bill of lading, and (2) by the failure of the bills to 'correspond with the description thereof in the bill at the time of its issuance' in the matter of their aggregate weight. It will be noted that the statement of the bills here as to weight is not absolute or positive, but the weight is stated 'subject to correction'."

THE CONSTRUCTION OF THE BILL OF LADING ACT.

The Act of Congress of August 29, 1916, generally called the Pomerene Bill of Lading Act, 39 Stat. 538, Ch. 415, U. S. Comp. Stat. 1916, Vol. 8, Secs. 8604 aaa, et seq., pp. 9311 et seq., controls this case.

Properly to construe the Act resort may be had to the classical rule of construction that consideration should be given to the old law, the evil and the remedy.

The Old Law.

In Friedlander v. Texas & Pac. Ry. Co., 130 U. S. 416, 32 L. Ed. 991, this court definitely established the rule of law that a bill of lading issued where no goods were received was outside the scope of the agency of the person issuing such bill and did not bind the carrier.

In Planters Fertilizer Mfg. Co. vs. Elder, 101 Fed. 1001, 42 C. C. A. 130, it was held that a carrier was not liable to a bona fide holder of a bill of lading for more than the quantity actually received when the words "weight and quantity unknown" or "weight unknown" were used.

In American Sugar Refining Co. vs. Maddock, the Circuit Court of Appeals for the First Circuit, 93 Fed. 980, held that the carrier was not liable except for the goods received by it and that the limiting words did not affect the situation.

It is not necessary to cite authorities to the contrary although there are such authorities. These may be found in a note to Chandler vs. Sprague, 5 Metcalf 306, 38 Am. Dec. 404, and in cases and text cited in Director General vs. Chandler, 106 S. E. 226.

The Evil.

Roberts' Federal Liability of Carriers, Sec. 351, points out the evil of the former decisions, refers to Friedlander vs. Texas & Pac. Ry. Co., supra, and quotes from the report of the Committee of Congress as follows:

> "Whether this decision in the Friedlander case was sound or not, it was based upon precedents, and ever since has been recognized as the law of the land by the Federal Courts as well as by some of the State Courts. This ruling has resulted in great losses to the buyers of merchandise who have the right to depend upon the bona fide bill of lading, to bankers and financial men who have bought or discounted drafts secured by these bills of lading, and to sellers and buyers of cotton, grain or other merchandise, whose transactions are discredited by reason of the frauds which have been perpetrated by fraudulent shippers conspiring with freight agents. As a result millions of dollars have been lost to commerce. The pending bill, Section 22, modifies the law as laid down in the Friedlander case by declaring 'that if a bill of lading has been issued by a carrier or on his behalf by an agent or employee, the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to—

(a) The consignee named in a straight bill, or

(b) The holder of an order bill, who has given value in good faith, relying upon the description therein of the goods for damages caused by the non-receipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.' "

The Remedy.

It cannot be doubted that Congress thought it was prescribing an adequate remedy for the evils existing at the time of the passage of the Pomerene law. It is historically true and judicially known that that law was passed largely at the instance of the commercial and banking interests. It is to the interest of business generally that order bills of lading shall be negotiable. If they are not, it is difficult for the owners of cotton, grain, etc., to obtain advances on bills of lading, and unless such advances can be obtained, the commerce of the country is handicapped. To meet this difficulty Congress said:

> Sec. 22. * * * * * The carrier shall be liable to the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier of all or part of the goods, or their failure to correspond with the description thereof in the bill at the time of its issuance."

Section 28 of the Act reads:

> "An order bill may be negotiated by the endorsement of the person to whose order the goods are deliverable by the tenor of the bill."

Section 29 reads in part:

> "A straight bill cannot be negotiated free from existing equities, and the endorsement of such a bill gives the transferee no additional right."

Section 31 reads:

> "A person to whom an order bill has been duly negotiated acquires thereby—
>
> (a) Such title to the goods as the person negotiating the bill to him had or had **ability to convey to a purchaser in good faith for value**, and also such title to the goods as the **consignee and consignor** had or had **power to convey to a purchaser in good faith for value**; and
>
> (b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him."

The whole Act shows an intention to make bills of lading negotiable instruments and to make void any efforts to prevent such negotiability.

If the decision of the trial court in this case is the law, then the effort of Congress to promote interstate commerce by the Pomerene Act has failed of its purpose.

The Pomerene Act had as its purpose to abolish the old law and to provide a remedy for the evils which had become burdensome to business.

This court has held the Pomerene Act to be constitutional and in doing so (United States v. Ferger, 250 U. S. at pp. 204, 205, 63 L. Ed. 941) gave reasons for its enactment as follows:

"That as instrumentalities of interstate commerce, bills of lading are the official means of credit resorted to for the purpose of securing and fructifying the flow of a vast volume of interstate commerce upon which the commercial intercourse of the country, both domestic and foreign, largely depends, is a matter of common knowledge as to the course of business of which we may take judicial notice. Indeed, that such bills of lading and the faith and credit given to their genuineness and the value they represent are the producing and sustaining causes of the enormous number of transactions in domestic and foreign exchange, is also so certain and well known that we may notice it without proof."

The Interstate Commerce Commission has prescribed uniform bills of lading for straight bills, and of course forms in conflict therewith are void. Bills of Lading, 52 I. C. C. 671, 676, 739.

In the Bills of Lading case a straight bill of lading is prescribed on which "weight (subject to correction)" occurs, but in speaking of order bills, the Commission said at 739:

"At the inception of this proceeding and during its pendency, issue was made in respect to certain features of the negotiability or assignability of bills of lading. The enactment of the Bill of Lading Act, 39 Stat. L. 538, comprehensively covers all of these matters, we believe, and no disposition of them remains to be made in this report."

A bill of lading falsely calling for 61 bales of cotton, when 61 bales of motes, called grabbots, were delivered, made the railroad liable for the value of 61 bales of cotton when an order bill was transferred to a bona fide holder. Chicago R. T. & P. Ry. Co. v. Cleveland, Okla. 160 Pac. 328.

When a bona fide purchaser of an order bill of lading calling for bales of cotton received only half bales of 250 pounds each, the carrier was held liable for full bales. Wichita Falls Exp. Co. v. Moody & Co., 154 S. W. 1032-1044 (decided March 12, 1913).

The Louisiana statute similar to the Federal statute makes order bills of lading fully negotiable. Thompson v. Hibernia Bank & Trust Co., 86 So. 652.

In Pioneer Trust Co. v. Nashville C. & St. L. Ry. Co. (Mo. App.), 224 S. W. 109-110, in a case arising before the passage of the Act relied on here, the court held that even a bona fide holder of an order bill of lading could not recover when no goods had been delivered to the carrier, but said:

> "The manifest hardship done to innocent holders of bills of lading by the rule found in the federal cases is alleviated to a great extent by the Pomerene Bill of Lading Act making interstate bills of lading negotiable."

Similar State statutes have been construed, and construed as plaintiff in error here contends the Federal statute should be construed.

Thus, under a statute making the acknowledgment of the receipt of property for transportation, contained in a bill of lading, conclusive evidence of the fact in favor of a bona fide holder of the bill of lading, a statement of the number of pounds of cotton received is held conclusive on the carrier, although the bill of lading contains a statement that the weights are subject to correction. Yazoo & M. Valley R. Co. v. Bent, 94 Miss. 681, 22 L. R. A. (N. S.) 821, 47 So. 805. The court in this case said:

"These bills of lading cannot be considered as contracts in the ordinary sense in which the word 'contract' is used. A common carrier owes a duty to the public not imposed upon an individual. Such contracts are subject to regulation under the law; and when a lawful regulation has been imposed, it is not within the power of the carrier to destroy the regulation by any printed form of contract required to be signed by shippers."

And under this statute a carrier cannot, as against a bona fide transferee of the bill of lading, explain a shortage of 7,768 pounds of cotton in a shipment, by showing that it did not receive the full amount called for by the waybill. Lloyd v. Kansas City, M. & B. R. Co., 88 Miss. 422, 40 So. 1005.

The broad principle of public policy is stated in Pollard v. Reardon, 65 Fed. 848, 13 C. C. A. 171, where the court said:

The bill of lading

"has become so universal and necessary a factor in mercantile credits that the law should make good what the bill of lading thus holds out. There is every reason found in the law of equitable estoppel and in sound public policy for holding, and no injustice is involved in holding, that, if one of two must suffer, it should be he who voluntarily puts out of his hands an assignable bill of lading, rather than he who innocently advances value thereon."

This language was quoted and followed in National Bank v. Kershaw Oil Mill, 202 Fed. 90, 120 C. C. A. 362; and the law now by the Pomerene Act does require the carrier to "make good what the bill of lading holds out".

The recognition by this court of the importance to commerce of bills of lading on which banks, factors and mer-

chants may rely is an added evidence and a forceful statement of the purposes of the Congress. Congress, to effectuate its purposes, prescribed rights under order bills of lading and carriers cannot, by the insertion of limiting language, repeal this law. It is what the statute requires and not the terms of the bill of lading which controls. Chicago, etc., Ry. Co. v. McCaull-Dinsmore Co., 253 U. S. 97, 64 L. Ed. 801.

The identical question involved in this case has been decided by the Georgia Court of Appeals in:

Atlantic Coast Line Railroad Company vs. Luke & Fleming, 20 Ga. App. 761, where at page 761 the court stated the issue to be as follows:

> "As the plaintiff in error specially urges that because the railroad delivered to the assignees of the bill of lading 'all and the very same cotton it received from the shipper', it should be relieved of liability, especially as the bill of lading had in it the words, 'weight subject to correction', and 'it was only quasi negotiable, that is, assignable as to the property itself, not as to the quality of the goods', we will discuss this proposition only."

And in its decision at page 764 said:

> "These words 'weignt subject to correction' evidently are intended to apply where the shipper furnishes the weights, and they are inserted for the protection of the carrier against error in the weight furnished by the shipper. In the case of Tibbits v. C. R. I. & P. R. Co., 49 Ill. App. 567, it appears that the shipper delivered to the carrier a quantity of corn for shipment. It was weighed by the weighmaster of the board of trade, properly sealed and shipped to its destination. The shipper filled out a

blank bill of lading, inserting the weight as given by the weighmaster, and the defendant's agent signed it. The bill of lading was then forwarded by the shipper to the plaintiff, and a draft was drawn on the plaintiff for the price of the corn according to the weight stated in the bill of lading, but, on opening the car, a shortage of 14,336 pounds of corn was found. The bill of lading contained a column at the top of which were the words, 'Weight subject to correction', and under this the weight of the corn was set down. It was held that the plaintiff, the consignee, had a right to recover on account of the shortage against the carrier."

And in its decision at page 765 said:

"The description of the cotton in the bill of lading in the instant case was 119 bales weighing 61,073 pounds. It will thus be seen that the number of bales was but a part of the description of the property received by the railroad. It is a well-known fact that cotton is sold by the pound and not by the bale, and when the agent of the defendant incorporated the number of pounds in the bill of lading, he should have been accurate. Every common carrier owes it as a duty to the purchasers of goods, bought on the faith of the carriers' statement as to weights in the bills of lading, that they speak the truth. When the agent of a railroad company weighs cotton to be shipped, and states a total number of pounds in excess of what is the real weight, this is the neglect of the railroad company, and the company, and not an innocent party, should suffer from the neglect."

In Louisville & Nashville Railroad Co. vs. Pferdmenges, Preyer & Company (8 Ga. App. 81) the assignee of the bill of lading, calling for 100 bales sued for the value of 4 bales alleging that the carrier had only delivered 96 bales. At page 83 of the decision the court said:

"While a bill of lading is in some sense a receipt and open to dispute between the parties, yet, when it is intended for negotiation, its recitals, in the hands of a bona fide transferee for value, operate as an estoppel against the carrier. The bill of lading in this case was issued by the railroad company with the intent that it should be negotiated. The purchasers of the cotton bought on the faith of the declaration of the railroad company that it had received 100 bales of cotton. If this statement was not true, the company might have some remedy against the shipper, but this does not relieve it from liability to the assignees of the bill of lading. It is a universal rule that carriers can not contradict the recitals contained in their bill of ladings, as to the delivery of the goods, their description, quantity, or condition, as against the rights of bona fide transferees for value.

In the case of Illinois Central Railroad Company vs. Doughty, 10 Ga. App. 317, the facts were that the bill of lading described the property shipped as 100 bales of cotton weighing 51990 pounds marked P A Y K, which bill of lading was transferred to the plaintiff, Doughty, who took it as a bona fide holder for value and demanded 100 bales of cotton of the above weight and marking. The carrier was unable to find any such cotton but tendered 100 bales marked PARK and of some 200 pounds less weight. In discussing the liability of the carrier the court said at page 319 of its decision:

"The bill of lading was conclusive upon the company both as to the number of bales and as to the weight, and, so far as these things tended to fix value, bound the company to deliver to the bona fide holder of the bill of lading cotton of that value. * * * * Under the law

as applied to this bill of lading the carrier should have been liable for the deficiency in weight."

In American National Bank vs. Ga. Railroad Co., (96 Ga. 665), in discussing the liability of the carrier to the bona fide assignee of an order bill of lading the Chief Justice said at pages 667-8:

"The law seems to be that where an agent has authority to issue bills of lading and does issue one with certain representations contained therein and the bill of lading is negotiated to an innocent third person the railroad company as between itself and such third person is estopped to deny the representations made in the bill of lading. Under these decisions it is immaterial that the bill of lading is not negotiable in the strict sense of the term. A representation in a non-negotiable chose in action, when acted upon, is, according to the usual rule applied in cases of estoppel, held to be equivalent in all respects to one made in the case of a negotiable paper. Some of the decisions referred to are also put upon the ground, that where one of two innocent parties must suffer from the wrongful act of a third part, the law casts the burden of loss upon him by whose act, omission or negligence such third party was enabled to commit the wrong which occasioned the loss. The superior equity is with the **bona fide** assignee who has parted with his money upon the faith of the recitals contained in the bill of lading."

IT WAS ERROR TO GIVE CONSIDERATION TO SECTIONS 20 AND 21 OF THE POMERENE ACT.

The learned trial judge (pages 35, 36 and 37 of the record) treats as applicable to the facts in this case Section 20 and discusses Section 21.

Section 20 does not apply because the presumption is that the goods were loaded by the shipper. The Consolidated Freight Classification No. 2, Rule 27, Sec. 1 reads:

> "Owners are required to load into or on cars freight for forwarding by rail carriers * * * carried at carload ratings."

However, even if the carrier had loaded the goods, this rule applies to package freight, freight in which the packages are small, and in which the aggregate of the packages determines the freight rate and in which ordinarily there will be no need for an order bill of lading. The language of the section refers to "freight not concealed by packages" and where the freight is not concealed, the carrier is prohibited from putting in limiting words such as "weight (subject to correction)" or to use the words in the statute, "shipper's weight, load and count."

It is clear from even a casual reading of Section 20 that it does not apply to bales of cotton and if Section 20 did apply, the language relied upon by the defendant in this case is prohibited because it is said:

> "And such carrier shall not insert in the bill of lading or in any notice, receipt, contract, rule, regulation or tariff, 'shipper's weight, load and count' or words of like purport, and if such words are inserted they shall be treated as null and void."

Section 21 has no application to this case. The section is limited to package and bulk freight. It is not contended that the freight here involved is bulk freight and, as will later be shown, it is not package freight.

The purpose of Section 21 is to protect carriers where packages are shipped so wrapped as to make it impossible for the carrier to know what they contain. The carrier knows nothing but the marks or labels on the package. In such cases the bill of lading does not recite what the packages contain but recites what the packages are said to contain. The contents and condition of the packages are unknown and the words "shipper's weight, load and count" are necessary because the carrier does not know what the goods are. In bales of cotton the carrier does know what is contained in the bales. The weight is easily ascertainable, and that it is cotton is shown from a mere inspection of the bales.

The learned trial judge seemed to think that the carrier was under no obligation whatever to state the weight but that cannot be, because unless the weight of the cotton is stated an order bill of lading has no value whatsoever, nor without the weight being stated could the freight charges be determined. Order bills of lading for cotton can only be negotiated when the amount of the cotton is stated in pounds.

The cases of Yazoo & M. Valley R. Co. vs. Bent, supra, and of Lloyd vs. Kansas City, M. & B. R. Co., and other cases cited, pages 29-34, show that the court below misconstrued the claimed limiting words in the bills of lading and the error of the court further appears when consideration is given to the meaning of the words "package" or "package freight."

The contracts here sued on were made in Alabama. The Supreme Court of Alabama, in Southern Express Co. vs. Crook, 44 Ala. 468, 4 Am. Rep. 140, 144, defined the word "packages" as used in an express bill of lading, saying:

> "In the first place, we hold that bales of cotton are in no proper sense packages, and for this reason it was unnecessary to state their value in the receipt.
>
> "There is, in our opinion, no more reason in calling a bale of cotton a package, than there is in holding a hogshead of tobacco to be so. Packages, as here used, must be interpreted to mean small parcels or bundles, whose appearance would give no adequate information of their value to the carrier."

The language of Section 20 does not fit freight like bales of cotton nor can it be assumed that the carrier loaded the freight, so the court erred in giving force to sections 20 and 21. Nor is section 22, the one on which this suit is based, limited by other sections. Section 22 is the one that protects the public by making order bills of lading negotiable.

When the carrier issued an order bill of lading, it was with the knowledge and intent that such bill should be negotiated. L. & N. R. Co. vs. Pferdmenges, supra. No limiting words were permitted by the statute, and any words that did limit it, if there were such, would be contrary to the statute, null and void.

If "weight (subject to correction)" had any meaning in the bill of lading, it meant only that slight and normal errors in weighing could be corrected. Tibbits vs. C. R. I. & P. R. Co., 49 Ill. App. 567.

It will be noted that the full freight charges were prepaid, the freight rate applied was applied to the weight stated, and full freight money was received and retained and is yet retained by the defendant in error. It was necessary to state the weight. It was an order bill of lading, one intended to be negotiated, and it could not be negotiated unless the number of pounds of cotton was stated.

IF THE WORDS "WEIGHT (SUBJECT TO CORRECTION)" HAD ANY MEANING IN THE BILLS OF LADING SUED ON, THEY MEANT ONLY SUCH REASONABLE DIFFERENCES IN NAMED AND ACTUAL WEIGHTS AS WOULD ORDINARILY OCCUR IN TWICE WEIGHING THE SAME COMMODITY.

The foregoing specification of error shows that the demurrer should not have been sustained, and the cause should, in any event, have been submitted to a jury. See Tibbits vs. C. R. I. & P. R. Co., 49 Ill. App. 567, supra.

UNDER THE FACTS, IT WAS ERROR TO DISMISS THE CASE BECAUSE IF THE LAW IS NOT AS CONTENDED FOR BY PLAINTIFF IN ERROR, THE FACTS PLEADED REQUIRE SUBMISSION TO A JURY OF BOTH ISSUES.

The foregoing specification is supported by assignment of error No. 10, as follows:

> Said Circuit Court of Appeals erred in rendering a judgment against the plaintiffs in error and in favor of said defendant in error for costs of suit, and in sustaining the dismissal of the cause of plaintiffs in error.

Plaintiff in error has, because of the wrong of defendant in error, suffered substantially. It promptly presented the facts of its claim and defendant in error has had full and ample opportunity to know all such facts. Plaintiff in error has diligently pressed its suit and this cause should be reversed to the end that when proof is made substantiating the injury, justice may be done.

Respectfully submitted,

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(Watkins, Russell & Asbill),
Attorney for Plaintiff in Error.

Atlanta, Georgia.

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IN THE

Supreme Court of the United States

LEIGH-ELLIS & CO.,
Plaintiff in Error,
vs.
JAMES C. DAVIS, AGENT,
Defendant in Error.

No. 246
October Term,
1921.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

On the 28th day of January, 1921, suit was filed by the plaintiff as transferee of two bills of lading issued by the Director General of Railroads, based upon the liability imposed by Section 22 of the bills of lading act, to recover the value of an alleged difference in the weight of certain cotton bales as set out in the bills of lading (subject to correction) and the actual weight of the cotton bales delivered to the plaintiff.

Copies of the bills of lading, signed by the shipper and the agent of the carrier, were attached, dated March 25, 1918, showing the receipt of 300 bales of cotton (contents and condition of contents of packages unknown) and the weight was stated "subject to correction". The petition showed that the full number of 300 bales was delivered to plaintiff.

The bills of lading contained the provision that "suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed."

The defendant interposed a demurrer upon general grounds, because the suit was barred by the contract limitation, and because there was no allegation in the petition that the defendant failed to deliver the exact number of packages set out in the bills of lading, or failed to transport and deliver all the identical property delivered to it for shipment.

An amendment was filed by plaintiff setting out a prior suit for the same cause of action, which had been dismissed on demurrer within six months prior to the filing of this suit.

A second amendment was filed by plaintiff, in which it appeared that after the delivery of the cotton and on or about April 25, 1918, a claim had been filed by plaintiff for the loss.

After argument the demurrer was sustained and the suit dismissed.

QUESTIONS INVOLVED.

The record presents two questions:—

1. Was the suit barred by the contract limitation in the bills of lading sued on.

2. When a carrier delivers the identical bales of cotton received by it for transportation, and the exact number of bales (packages) recited in an order bill of lading issued by

its agent, is it liable under the Act of Congress of Aug. 29, 1916, known as the Pomerene or Bill of Lading Act, to a purchaser of the bill of lading, for the difference between the actual weight of the bales of cotton and the weight stated in the bill of lading, when such statement as to weight is qualified by the words "subject to correction" and "contents and condition of contents of packages unknown"?

BRIEF OF LAW AND ARGUMENT.

FIRST.

The Georgia statute, giving a plaintiff who dismisses his suit the right to renew within six months, has no application to contract limitations.

In the case of **Melson** v. **The Phoenix Insurance Co., of Brooklyn,** 97 Ga., 722, the court said, "Section 2932 of the Code, which gives a plaintiff who is non-suited the right to renew his action within six months, has no application. It is only a part of the law of limitations; and when the parties by agreement make a fixed and unqualified limitation for themselves, they abandon all the legal regulations on the subject, and conseqnently must stand upon their contract as written.

This principle was reaffirmed in the case of **Gross** vs. **Globe and Rutgers Fire Insurance Co.,** 140 Ga., 531, and the construction given the statute by the Supreme Court of Georgia is binding on the Federal courts.

SECOND.

The suit is barred by the bill of lading limitation.

Parties may agree upon a shorter period of limitation than that fixed by statute, and such agreements have been

uniformly held valid where the term is not unreasonably short.

The United States Supreme Court held the limitation of 90 days in a bill of lading was not unreasonable. **M. K. & T. v. Harriman,** 227 U. S., 657, 672 and 673. This was before the Cummins amendment, which provided that the carrier in its bill of lading should not limit the time of bringing suit to a period of less than two years. In so holding the Court said:

> "The purpose of statutes of limitations is to encourage promptness in the bringing of actions, that parties shall not suffer from loss of evidence by death or disappearance of witnesses, destruction of documents, or failure of memory, but there is nothing in the purpose or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. **That is a question of law for the determination of the Court."**

It was doubtless in view of this decision that Congress in passing the Cummins amendment inserted the two-year provision. Congress, we think, thus determined what was a reasonable time. In view of such determination by Congress, and the fact that what is a reasonable time is a question of law **for the Court,** we think the determination of the Interstate Commerce Commission in the case of **Decker & Sons v. Director General,** 55 I. C. C., 453, can have no influence upon the determination of this case.

It was so held by the Supreme Court of Appeals of West Virginia, in the case of **William F. Mosser Co. vs. Payne, Director General,** 114 S. E., 365, decided Oct. 17, 1922. The Supreme Court of Errors of Connecticut in **Humphrey-Cornell Co. v. Hines** 115 A., 561, held that the action of the

Interstate Commerce Commission was prospective and did not affect bills of lading already issued.

The opinion of the Commission to the effect that two years and one day will for the future be unreasonable unless the same begins to run from the date of declining claim, is contrary to the Act of Congress and the decisions of the Supreme Court of the United States. In its decision in the Harriman case this court followed **Express Co.** v. **Caldwell**, 21 Wall., 264, and said:

> "Such limitations in bills of lading are very customary and have been upheld in a multitude of cases. We cite a few: **Central Vermont Railroad** vs. **Soper** (1st C. C. A.), 59 Fed. Rep., 879; **Ginn** vs. **Ogdensburg Transit Co.** (7th C. C. A.), 85 Fed. Rep., 985; **Cox** v. **Central Vermont Railroad**, 170 Massachusetts, 129; **North British, &c., Insurance Co.** v. **Central Vermont Railroad**, 9 App. Div. (N. Y.), 4 aff'd 158 N. Y., 726."

In **Texas & Pacific Ry.** v. **Leatherwood**, 250 U. S., 478, 481, decided June 9, 1919, the same conclusion was announced as follows:

> "That provision in the original bill of lading limiting to 6 months the time within which suit may be brought not being unreasonable (**Mo. K. & T. Ry. Co.** vs. **Harriman**, 227 U. S., 657, 672-673) was valid."

It is true that the transportation act of 1920 amended the Cummins amendment by inserting after the provision limiting the time "for the institution of suits" to two years the following:

> "Such period of institution of suits to be computed from the date when notice in writing is given by the carrier to the claimant that the carrier has disallowed

the claim or any part or parts thereof specified in the notice."

This amendment became effective at the end of Federal control and has no effect upon the rights of the parties in this suit. In the present case it appears that a claim was filed April 25, 1918, and definitely declined July 28, 1919, which was before the beginning of the last 6 months of the limitation period. The suit was not filed until the 28th day of January, 1921, which was 18 months after the claim had been definitely declined, and 2 years and 9 months after the claim was filed.

The transportation act of 1920, Section 206 (a), does not in any way affect the limitation contained in the bill of lading. The purpose of this section of the transportation act was to further limit the time within which suits may be brought and not to extend it. It is a new statute of limitations and in many cases reduces the time for bringing suit that would otherwise be authorized by State or Federal laws. There was no intention, we think to extend the time beyond that provided in the bills of lading where the bill of lading provision is authorized by the Cummins amendment. Where the bill of lading provision limits the time for bringing suit to two years and one day, after the delivery of the shipment, or after a reasonable time for delivery has expired, the provision is, we think, prescribed by Federal statute within the meaning of Section 206(a) of the transportation act or the Statute was not intended to apply to contract limitations. If such is not the case, then claims that were barred by the two-year and one day provision at the time of the enactment of the transportation act thereby were revived and recovery permitted. If section 206(a) is to be construed as petitioner contends, suit can be brought for damage to any shipment during Federal control, where claim was filed in proper time, up to March 1,

1922. Stale claims more than four years old could thus be sued upon and the carrier held liable notwithstanding the salutary policy involved in the Cummins amendment authorizing the limiting of the time to 2 years and notwithstanding many of such claims had been barred before the passage of the transportation act and notwithstanding the apparent hardship upon the Government growing out of the failure to bring suit promptly while evidence might still be available upon which a defense could be established, but because of delay the Government is deprived of its testimony and of an opportunity to make an adequate defense. That a provision in a bill of lading, authorized by the Cummins amendment, constitutes a limitation **prescribed by Federal** law is supported, we think, by the language of this court in **Tex. & Pac. Railroad Co.** v. **Leatherwood**, 250 U. S., 478, 481, where it is said:

> "The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination and its terms in respect to conditions of liability are binding upon the shipper and upon all connecting carriers just as a rate properly filed by the initial carrier is binding upon them. **Each** has in effect the **force of a statute** of which all affected must take notice."

We think Congress regarded tariffs and the usual bill of lading provisions authorized by law as having the force of **statutes** and, where authorized by Federal statutes, regarded the limitation of the time for bringing suit as a limitation **prescribed by Federal law.**

The precise question involved in this case has been decided recently by the Supreme Court of Appeals of West Virginia and by the Supreme Court of Wisconsin.

In the case of **William F. Mosser Co. vs. Payne, Director General of Railroads,** 114 S. E., 365, decided Oct. 17, 1922, the Supreme Court of Appeals of West Virginia held that the contract limitation was not affected by the Transportation Act and especially was not extended by Section 206(a) of that Act. It was also held that the time for bringing suit contained in the bill of lading, being the subject of special contract, cannot be avoided by the shipper on the theory of unreasonableness.

In the case of **Northern Milling Company v. Davis, Agent,** 190 N. W., 351, decided Nov. 8, 1922, the Supreme Court of Wisconsin held that limitations in bills of lading that suits shall be brought against the carrier within two years are valid; that such contract limitations were not affected or extended by Section 206(a) of the Transportation Act, and that it was the intent of Congress to limit and not to extend the time of bringing such actions.

The Circuit Court of Appeals of the Second Circuit, in the case of **New York Central R. Co. vs. Lazarus** et al., 278 Fed., 900, decided January 18, 1922, held that the provision of Section 206(f) of the Transportation Act to the effect that the period of Federal Control should not be computed as a part of the period of limitations against carriers for causes of action arising prior to Federal Control did not affect contract limitations in a bill of lading. The Court further held that Congress has the right to extend the Statute of Limitations, because the right to bring an action does not enter into and become a part of the contract, "but where the time within which an action could be brought is agreed upon by the terms of the contract of shipment, it is one of the terms and conditions thereof and Congress could not deprive the plaintiff in error of this property right, for to do so would be a violation of the provisions of the Fifth Amendment".

A decision of the Supreme Court of Michigan to the same effect was handed down July 20, 1922, in the case of **Thomas Canning Co.** vs. **Southern Pac. Co.**, 189 N. W., 210.

Parties to a bill of lading cannot waive its terms, nor can the carrier by its conduct give the shipper a right to ignore them. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed.

Ga. F. & A. R. Co. v. **Blish Milling Co.**, 241 U. S., 190-197.

Tex. & Pac. v. **Leatherwood**, 250 U. S., 481.

William F. Mosser Co. vs. **Payne, Director General**, 114 S. E., 365.

There is no merit in the contention that the contract limitation in the bills of lading does not cover this particular kind of suit. Plaintiff's counsel, in his statement of the case in his brief, described it as an action "on a breach of contract for the failure to deliver cotton."

Section 3 of the bills of lading sued on provides: "Suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, **or in case of failure to make delivery**, then within two years and one day after a reasonable time for delivery has elapsed". The limitation not only covers loss, damage, or delay, but expressly covers **failure to make delivery**, for which this suit was brought.

THIRD.

The petition fails on the merits.

When a carrier delivers the identical bales of cotton received by it for transportation and the exact number of

bales (packages) recited in an order bill of lading issued by its agent, it is not liable under the Act of Congress of Aug. 29, 1916, known as the Pomerene or Bill of Lading Act to a purchaser of the bill of lading, for the difference between the actual weight of the bales (packages) of cotton and the weight stated in the bill of lading when such statement as to weight is qualified by the words "subject to correction" and "contents and condition of contents of packages unknown".

There is no allegation that the loss in weight was due to any injury to or destruction of the cotton by the carrier. It is admitted that the exact number of bales called for by the bills of lading was delivered. There is no allegation that the carrier failed to transport and deliver all of the identical property delivered to it for shipment. The claim of liability is based solely upon the weight stated in the bills of lading. Those bills of lading contained the statement "contents and condition of contents of packages unknown", and the weight was given "subject to correction".

Prior to the passage of the Pomerene bills of lading act of August 29, 1916 (39 Stat. 538, ch. 415), where merchandise was not actually received by a carrier, although a bill of lading was issued by its agent either through fraud or mistake, the Supreme Court of the United States and other courts have held that as the receipt of the goods lies at the foundation of the contract to carry and deliver, there can be no such contract unless the goods have actually been received, and that an agent of the carrier has no authority to issue a bill of lading without actual receipt of the goods and can not bind the carrier, even as to an innocent transferee or pledgee of the bill of lading.

Hickox v. Buckingham, 18 Howard, 155.

The Lady Franklin, 8 Wallace, 325.

Pollard v. **Vinton**, 105 U. S., 7.

St. L., I. M. & S. Ry. v. **Knight**, 122 U. S., 79.

Friedlander v. **T. & P. Ry. Co.**, 130 U. S., 416.

Mo. P. Ry. Co. v. McFadden, 154 U. S., 155.

Where a part of the goods was received, the carrier was permitted to insert in the bill of lading, "shipper's weight, load, and count", "weight subjejct to correction", "contents and conditions of contents of packages unknown", or some like clause qualifying his representation, and in such event was not liable to the assignee for value if he delivered all the goods received.

N. C. & St. L. Ry. Co. vs. **Flournoy**, 139 Ga., 582.

Maddock v. **American Sugar R. Co.**, 91 Fed., 166.

American Sugar Refining Co. vs. **Maddock**, 93 Fed., 980.

The Querini Stamphalia, 19 Fed., 123.

Palmetto F. Co. vs. **Columbia N. & L. Ry.**, 83 S. E., 36.

Alabama G. S. R. Co. v. **Commonwealth Cotton M. Co.**, 42 So., 406.

St. L. S. & F. R. Co. v. **Woodruff Mills**, 62 So., 171.

Planters Fer. Mfg. Co. v. **Elder**, 101 Fed., 1001.

The plaintiff is not saved by any of the provisions of the Pomerene bills of lading act from these well-established principles of law.

Section 20 of the act is as follows:

When goods are loaded by a carrier, such carrier shall count the packages of goods, if package freight,

and ascertain the kind and quantity if bulk freight, and such carrier shall not in such cases insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff "shipper's weight, load and count", or other words of like import indicating that the goods were loaded by the shipper and the description made by him, or in case of bulk freight and freight not concealed by packages, the description made by him. If so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein."

This section of the act divides all freight into two classes, package and bulk. Cotton in bales is clearly package freight. It is packed in permanent bales capable of marking and handling as such. It is impossible to think of it as bulk freight. Plaintiff's counsel in his brief admits that it is not bulk freight.

The only requirement of the act as to package freight is to "count the packages". When package freight is loaded by the carrier, the description as to the number of packages can not be qualified by " 'shipper's weight, load, and count', or other words of like import indicating that the goods were loaded by the shipper and the description made by him." "Weight subject to correction" and the other qualifying words in the bill of lading are not words of like import indicating that the goods were loaded by the shipper and the description made by him. There is nothing in the act forbidding the words used. The act requires the carrier to count the packages, if package freight, and not to insert words indicating that the goods were loaded by the shipper. The number of packages is the description upon which the purchaser may rely in buying the bill of lading. He can not say that he relied upon any statements in the bill of lading that the cotton weighed 149,025 pounds. There was no

such description in the bills of lading. They specifically put the purchaser on notice that the statement as to weight was "subject to correction."

Section 21 of the act deals with freight loaded by the shipper and permits the carrier to qualify its description. If the cotton in the present case was loaded by the shipper, the qualifying words "Contents and condition of contents unknown" and "weight subject to correction" would unquestionably relieve the carrier.

We can not agree with the contention of plaintiff's counsel that there is any presumption to the effect that the goods were loaded by the shipper. In bringing suit under a statute which prescribes one duty where goods are loaded by the carrier and another duty where goods are loaded by the shipper, the plaintiff should state whether the goods were loaded by one or by the other, and the presumption, if any, will be in favor of the carrier's having complied with the statute. Pleadings are always construed more strongly against the pleader.

Stress is laid by the plaintiff's counsel upon the statement that the Pomerene Act makes bills of lading negotiable. It makes them negotiable only to the extent provided by the act itself. The rights and liabilities of the parties are determined by the language used in the act and not merely by the statement that bills of lading are negotiable. Decisions under the State statutes on the subject are of little benefit, because the statutes differ greatly. For one thing, the uniform bills of lading act, adopted by a number of States, has no provision similar to sections 20 and 21 of the Pomerene Act.

Section 22 of the act specifies the liability as follows:

> That if a bill of lading has been issued by a carrier on his behalf by an agent or employee the scope of

> whose actual or apparent authority includes the receiving of goods and issuing bills of lading for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to * * * (b) the holder of an order bill who has given value in good faith, relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier of all or a part of the goods, or their failure to correspond with the description thereof in the bill at the time of its issuance.

The petition in the present case affimatively shows that the carrier counted the packages correctly and delivered the right number of packages. That was the description and the only description of the freight required by the act. That was the only description which the holder of the bill of lading had a right to rely upon in giving value in good faith for the bill.

There is no force in the argument of plaintiff's counsel that it is necessary to state the weight before the bill could be negotiated. It might just as well be contended that the grade should be stated, because that factor must be known before a purchaser would give value for the bill, "relying upon the description therein of the goods".

If the carrier undertook to insert other elements of description in the bills of lading not required by the bills of lading act, those descriptions were not covered by the act; the carrier had a right to qualify them, and his liability would be determined as to them by the principles of law in effect before the act was passed. Having based his action on section 22 of the Pomerene Act, plaintiff can not maintain his suit unless he brings himself squarely within the terms of the act.

As was well said by Judge Sibley in his opinion:

"Not being bulk freight in the meaning of the section, kind and quantity need not be ascertained and stated. If the description in the bill be enlarged by stating the nature of the contents of the packages, or the weight of them, it is voluntary and gratuitous, and the statements may be guarded and qualified as the carrier sees fit. Since freight is based on weight, the carrier will generally ascertain the weight also in case of package freight and may conveniently state it in the bill as the basis for the freight charges. In doing so the statement may be made as 'subject to correction', as in the case at bar, for the prohibition of the statute against the qualification of the statement of quantity applies only to bulk freight".

Respectfully submitted,

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